

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

PATRICK CALLIARI,)	
individually and as)	
Representative of the)	Case No. C08-1111MJP
Former Shareholders of GCI)	(Consolidated with
INVESTMENTS, INC., a)	C08-1112MJP)
Washington Corporation,)	
)	SEATTLE, WASHINGTON
Plaintiff,)	December 8, 2009
)	
v.)	
)	
SARGENTO FOODS, Inc.,)	
)	
)	
Defendant/Counterclaim)	
Plaintiff,)	
)	
v.)	
)	
PATRICK C. CALLIARI, et)	
al.,)	
)	
Counterclaim Defendants.)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: MR. MICHAEL GOLDFARB
MR. BRAD FISHER

For the Defendant: MR. ROBERT SULKIN
MR. DAVID LINEHAN

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2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXAMINATION INDEX

EXAMINATION BY		PAGE
ANTOINE IOANNIDES	CONTINUED DIRECT EXAMINATION	16
	BY MR. FISHER	
	CROSS-EXAMINATION	24
	BY MR. SULKIN	
	REDIRECT EXAMINATION	44
LOUIS GENTINE	BY MR. FISHER	
	DIRECT EXAMINATION	46
	BY MR. GOLDFARB	
	CROSS-EXAMINATION	146
	BY MR. SULKIN	

EXHIBIT INDEX

EXHIBITS ADMITTED	PAGE
233	17
13	21
15	51
2	89
4	116
20	117
8	120
24	122
16	124
5	129
34	131
14	132
58	136
59	137
1	156
215	174

PROCEEDINGS

THE COURT: Good morning. Please be seated. Counsel, a couple of things on your time. You start out with 825 minutes. The plaintiffs used 75 minutes, and so they have a balance of 750. The defendants have a balance of 768.

I have the corrected page from our jury instructions for No. 19. What I intend to do is ask that the jurors hand in No. 19, and we will substitute with a new instruction to correct the typographical error.

MR. LINEHAN: Thank you, your Honor.

THE COURT: Before we bring our jurors out, are there any other issues we need to take care of?

MR. FISHER: There are two stipulations, your Honor, that we would like to put in the record before we begin today.

THE COURT: All right.

MR. FISHER: But first I looked up this nuance argument on Rule 801. The parties have agreed that exhibits that have been identified by the opposing party may be used in the case. So, in other words, the plaintiffs can use anything on defendants' exhibit list, and the defendants can use anything identified by the plaintiffs on their list. We're stipulating to --

THE COURT: What does "use" mean? Are you talking

1 about admitted? Are you talking about authentic?

2 MR. FISHER: My understanding is that we're talking
3 about admitted. If the opposing party elects to use an
4 exhibit that the other party has designated, then the first
5 box would be checked on those.

6 THE COURT: So you are modifying your pretrial order?

7 MR. SULKIN: No, your Honor. I'm just not -- to make
8 it much more simple, I won't object when he tries to put in
9 an exhibit that's on my list already. It will just come in,
10 so we won't bother the court with that. This was one of the
11 horse-trading issues we talked about.

12 THE COURT: Well, Mr. Sulkin, I'm not bothered by it.

13 MR. SULKIN: Oh, okay. I'm sorry.

14 THE COURT: So essentially you are negating your
15 pretrial order, because you went through and classified
16 various documents, including the one that we were talking
17 about yesterday, 233, I believe, as authentic but
18 inadmissible.

19 MR. FISHER: Your Honor, I think what we're doing is
20 waiving any of our objections to our own exhibits. We
21 designated 1 through 61. The stipulation is that we are
22 waiving any objections to the admissibility of those. The
23 defendants are waiving any objections to the admissibility of
24 their 200 through 288, if we elect to use them.

25 THE COURT: So let me try again, Mr. Fisher. You are

1 negating your pretrial order with this stipulation?

2 MR. FISHER: No, your Honor. We understood we were
3 stipulating to our own exhibits under Local Rule 16(I) or
4 16(H). So we understood that we were not objecting to our
5 own exhibits and that --

6 THE COURT: Why would you object to your own
7 exhibits?

8 MR. FISHER: I wouldn't, your Honor. I've never
9 objected to our own exhibits. I think the point was,
10 yesterday the dispute about 233 was, it was on their list, we
11 wanted to use it, and then they objected to it as hearsay.
12 And it's their own exhibit.

13 And the agreement that was reached to resolve these issues
14 was that we were both agreeing not to object to our own
15 exhibits. So if there's an objection to admissibility in our
16 respective lists, those are reserved.

17 So if Mr. Sulkin has objected to something on the
18 plaintiffs' list, we would still have to lay the foundation
19 for the admissibility of that document, and vice versa.

20 THE COURT: Mr. Fisher, I have not understood
21 anything you just told me. Let's pull up a pretrial order
22 and start from there. Is the pretrial order still operative?

23 MR. FISHER: It is in our view, your Honor.

24 THE COURT: All right. Then let's use 233 as an
25 example. 233 was the e-mail that we were talking about with

1 the witness yesterday.

2 MR. FISHER: Correct.

3 THE COURT: In the pretrial order, it indicates that
4 it is authentic but it is inadmissible. Okay. That means to
5 me that you don't have to lay the foundation that it is in
6 fact an accurate e-mail, but you do have to show that it is
7 admissible. And hearsay would be a valid objection to the
8 document.

9 So what is different about your agreement?

10 MR. FISHER: The difference is, your Honor, that
11 Mr. Sulkin and Sargento have agreed that, because that is one
12 of the exhibits that they selected for trial, that they are
13 not objecting to the use of that exhibit.

14 THE COURT: So they are now moving everything that
15 they put into the authentic but inadmissible category into
16 the agreed admissibility category?

17 MR. FISHER: No, your Honor, because if we don't want
18 to use -- if we don't use the exhibit, but they want to use
19 the exhibit, our objections to admissibility would still be
20 in place and vice versa.

21 I think we can -- maybe, I think, for the instant purposes
22 here, the consequences of this is that there is no objection
23 to the use and admissibility of 233 for purposes of
24 completing Mr. Ioannides.

25 THE COURT: Well, that's different than what we

1 started out with. If you want to admit 233, Mr. Sulkin, all
2 he has to do is, you have to offer and he has to withdraw his
3 objection.

4 MR. FISHER: Okay. And we were trying to do that in
5 one sweep with respect to our respective exhibits. But we
6 can do it that way, certainly.

7 THE COURT: Okay. Mr. Sulkin, can you try here?
8 Because I'm not understanding what your agreement is.

9 MR. SULKIN: Okay. Your Honor, if you look at 233,
10 this is a document that we listed that we wanted to use.
11 They objected to our use of it, okay? There is no place on
12 this list, pretrial order, for our objecting to their using
13 it.

14 THE COURT: I see. All right.

15 MR. SULKIN: I'm trying to cut to it. So when they
16 offered it, it is hearsay. We've agreed that if I listed
17 something on my list, they can use it, okay, and vice versa.
18 If they list something on their list, I can use it. We're
19 not changing any of the objections the other way around. So
20 that was sort of the horse-trading deal that we made. I hope
21 that's clear.

22 THE COURT: All right. I get it. Let's bring in our
23 jury.

24 MR. FISHER: Your Honor, could we put one other
25 stipulation on the record before we begin?

1 THE COURT: Okay.

2 MR. FISHER: We've had discussions about the issue of
3 damages in the event the jury finds for the plaintiff on the
4 employment claim under the employment agreement. And the
5 agreement of the parties is that the issue of the amount of
6 damages on the contract claim under the employment agreement
7 would be decided by the court on the following basis: The
8 parties stipulate that if there is discounting, that it would
9 take place at 5 percent; that prejudgment interest, if any,
10 of course, is for the court; and the issue that Sargento is
11 reserving is whether, if there was a breach of that
12 agreement, the payment stream from today through 2012, they
13 are reserving the right to argue that that should not be
14 discounted to present value and paid in a lump sum now, but
15 that they should be able to resume making periodic payments
16 under that agreement if the jury finds them to be in breach.

17 So the parties are in agreement that those things would be
18 for the court at the end. So the jury will not be asked to
19 put a number on the contract employment claim.

20 THE COURT: Mr. Sulkin.

21 MR. SULKIN: That's correct, your Honor.

22 THE COURT: All right.

23 MR. LINEHAN: Your Honor, we have one other point we
24 would like to raise before the jury comes in.

25 THE COURT: All right.

1 MR. LINEHAN: And it relates to the deposition
2 transcript of Karl Linck, which I understand that the
3 plaintiffs are intending to read into the record today.
4 There is actually two significant problems with that that I
5 think would be better to take care of it before the jury
6 comes in, if that's possible.

7 The first problem is that the lion's share of their
8 designations in Mr. Linck's testimony relate to questions and
9 e-mails regarding Mr. Linck's discussions with the South
10 Dakota Department of Agriculture. And as I'm sure the court
11 remembers, you dismissed all the claims relating -- or our
12 counterclaims relating to the South Dakota regulatory issues.

13 THE COURT: Back up and tell me who Mr. Linck is,
14 please.

15 MR. LINEHAN: I'm sorry. Certainly, your Honor.
16 Mr. Linck is the head of engineering at Sargento. So he
17 deals with a lot of the regulatory and compliance issues
18 related to their plants.

19 THE COURT: Okay.

20 MR. LINEHAN: So they've designated some of that
21 testimony. They would like to read it in. We think it's
22 irrelevant in light of the court's ruling dismissing the
23 South Dakota regulatory counterclaims.

24 Our understanding is that their argument is, well, whether
25 or not Mr. Linck passed those e-mails or had those

1 discussions regarding South Dakota regulatory issues with
2 Mr. Calliari is a reflection of whether or not he was
3 deprived of operational control.

4 But as we've already seen in Mr. Calliari's notice, where
5 he resigns for good reason and lists his good reasons,
6 there's nothing in there -- he raises Unilever and Bellingham
7 Cold Storage and SPA accounting issues and Birds Eye
8 interference, but he says nothing about being excluded from
9 South Dakota regulatory negotiations.

10 And the fact that Mr. Sulkin deposed him, Mr. Calliari, in
11 June of this year, he was asked, okay, we want to make sure
12 we understand everything you are claiming is an operational
13 control violation. And he listed Unilever, Bellingham Cold
14 Storage, SAP, Birds Eye, and some general interference by
15 Mr. Gordy and Mr. McEvoy with relation to the Bellingham
16 plant.

17 Again, he said nothing whatsoever about South Dakota
18 regulatory issues being something that was a reflection of an
19 infringement of his operational control. So for all those
20 reasons, we think that anything about that in his deposition
21 should be excluded.

22 I mentioned there were actually two problems. The second
23 problem is that Mr. Linck was -- the only reason Mr. Linck
24 testified in this case is because we had those warranty
25 counterclaims. His testimony was not relevant or offered for

1 anything else.

2 After they deposed him on his 30(b)(6) issues, which was
3 relating to South Dakota warranties and wastewater and all
4 those sort of things, they asked him some other questions
5 just generally about his substantive understanding of the
6 operational control language in the agreement.

7 And even though he testified that he hadn't read the stock
8 purchase agreement until a couple of days before the
9 deposition, and even though he had had no basis for knowing
10 anything about what the operational control language meant to
11 Mr. Calliari's employment agreement or under the SPA, they
12 got a few sound bites that they liked from Mr. Linck.

13 And our concern is that if the jury were to hear all those
14 -- it's not a lot, just a few snippets where he talks about
15 his understanding of what operational control meant, number
16 one, it's immaterial because this is a contract case, and one
17 witness' subjective understanding of what operational control
18 meant is not relevant to interpreting what operational
19 control means in the contract.

20 And second of all, there was a 30(b)(6) deposition on
21 operational control. And Sargento identified the testimony
22 of Mr. Gordy on some operational control issues and
23 Mr. Gentine on other operational control issues. That is the
24 testimony of Sargento on what operational control means, not
25 an engineer who has never read any of the documents.

1 That's our pitch on that point.

2 THE COURT: So what is it that you are asking me for?

3 MR. LINEHAN: I'm asking you to preclude the reading
4 of Mr. Linck's deposition, because other than a couple of
5 snippets about his background, they haven't identified any
6 other pieces of that deposition that they want to read that
7 relates to anything other than South Dakota regulatory or his
8 subjective understanding of operational control.

9 THE COURT: And how can I do that without reading his
10 deposition?

11 MR. LINEHAN: Your Honor, you probably should take a
12 look at those snippets and read through. It's not a very
13 voluminous set of designations.

14 THE COURT: Okay. Because I was told that I didn't
15 have to look at any depositions that were going to be read.
16 So you are asking me to preclude testimony without me taking
17 a look at it.

18 MR. LINEHAN: Okay.

19 THE COURT: And how can I do that right now while
20 we've got the jury waiting?

21 MR. LINEHAN: I completely agree, your Honor. You
22 probably should take a look at all of those and make sure
23 that I've characterized them accurately, because the other
24 side may obviously have a dispute with whether or not I've
25 accurately summarized what they said.

1 THE COURT: Then my suggestion is that you put those
2 before me so I have a chance to look at it.

3 MR. LINEHAN: Okay. I've got the transcripts here if
4 you would like, your Honor.

5 THE COURT: Okay. Well, right now we're going to run
6 a trial, so I don't usually listen to testimony and read well
7 at the same time --

8 MR. LINEHAN: Sure.

9 THE COURT: -- if you want me to pay attention to one
10 versus the other.

11 MR. LINEHAN: Sure.

12 THE COURT: So why don't you give me the material.

13 MR. LINEHAN: Okay.

14 THE COURT: I'll take a look at it this evening. And
15 we will push on from there.

16 MR. LINEHAN: Thank you, your Honor. May I approach?

17 THE COURT: I'm assuming that that is what the
18 plaintiffs would like to have me do?

19 MR. LINEHAN: You should hear from them perhaps.

20 MR. FISHER: Your Honor, there's one problem with
21 that. I think this is going to happen today. I didn't know
22 there was any objection to relevance or anything else until
23 this morning, so I didn't -- but we were planning on reading
24 his testimony after Mr. Gentine testifies.

25 THE COURT: Do you have to do that?

1 MR. FISHER: No. Yeah, I think -- yeah. Okay.
2 We'll reorder the witnesses.

3 THE COURT: Because we still have another witness to
4 finish, and you want to put on Mr. Gentine. You've got to
5 give me time to look at these things.

6 MR. FISHER: Sure, your Honor. And, also, at an
7 appropriate time, obviously, we do disagree. It's an
8 admission of a party opponent. And we reserve our discussion
9 on that for later. We just didn't want you to rule before we
10 had a chance.

11 THE COURT: All right. Do you have the designations?

12 MR. LINEHAN: This is the copy you e-mailed to me.
13 And I've got an extra copy for you as well.

14 MR. FISHER: I have copies.

15 MR. LINEHAN: May I approach, your Honor?

16 THE COURT: Yes.

17 All right. Now are we ready to bring the jury in?

18 MR. FISHER: We are, your Honor.

19 THE COURT: Okay. Let me explain a little bit about
20 the rules here, okay? When we keep the jury waiting, your
21 clock is ticking. If you let me know that you need something
22 to be ruled on either before 9 o'clock or after, then it's my
23 time, okay?

24 MR. LINEHAN: Understood, your Honor.

25 THE COURT: Okay. So I don't know how to fix this

1 particular problem if you want me to read this. If you have
2 things that you want to get rulings on ahead of time, you've
3 got to put them in front of me. I don't guess at it, okay?

4 MR. LINEHAN: Understood.

5 THE COURT: All right. Let's bring out our jury.

6 (Jury enters courtroom.)

7 THE COURT: Please be seated. Good morning. Ladies
8 and gentlemen, let me explain a little bit. We kept you
9 waiting here a while. And I want you to know that we didn't
10 take an extra coffee break. We've been out here working.
11 There are things that happen in a trial. Actually, two
12 things are going on at the same time. There's your job and
13 there's my job.

14 My job is to decide the law. Your job is to decide the
15 facts. So sometimes we will wait for each other. For
16 example, I will wait for you while you deliberate. Sometimes
17 you will have to wait for me to do my job so that the next
18 presentation can run smoothly. So that's why I ask for your
19 patience.

20 We've discovered that there is a typographical error in
21 one of the instructions that you were given, Instruction 19.
22 So what I would like you all to do is pull out 19 from your
23 notebooks. Pass them down, and we'll gather those up. And
24 put the new 19 in. That way everybody will have a decent
25 set.

1 I believe we're going to continue with our witness this
2 morning. Is that right, Mr. Fisher?

3 MR. FISHER: It is, your Honor.

4 THE COURT: All right. Could I please have you come
5 forward, sir? You've not been released from your oath. You
6 may have a seat.

7 ANTOINE IOANNIDES,
8 being previously duly sworn, the witness was recalled and
9 further testified as follows:

10 CONTINUED DIRECT EXAMINATION

11 BY MR. FISHER:

12 Q Good morning, Mr. Ioannides. We're picking up your
13 testimony where we left off yesterday afternoon in this
14 matter. When we ended the day yesterday, we were discussing
15 events that took place after the stock purchase agreement had
16 been executed by the parties.

17 And I would like to start by asking you some questions
18 about when it was that you became concerned about this issue
19 of operational control, okay? So let's start there. When
20 did you become concerned about the issue of operational
21 control under the stock purchase agreement?

22 A As early as August 2007.

23 Q In the summer of 2007?

24 A A few months after signing the contract.

25 Q Okay. And what were the issues that gave you concern?

1 A Well, it was mainly the contract of Unilever.

2 Q And what do you recall about what was going on with
3 Unilever?

4 A They were trying to nullify the contract prices.

5 Q And what did you do in response to that?

6 A I have informed verbally and written Mr. Calliari about
7 our concern and our willingness to come over, if it's
8 necessary, to discuss with all parties.

9 Q Okay. Can I ask you to look at Exhibit 233.
10 Mr. Ioannides, do you have Exhibit 233 in front of you?

11 A Yes, I do.

12 Q Do you recognize Exhibit 233?

13 A Yes, I do.

14 Q What is Exhibit 233?

15 A It's an e-mail which I sent to Mr. Calliari.

16 Q And what is the date of that e-mail?

17 A 12th of August, 2007.

18 Q August 12, 2007?

19 A Yes.

20 MR. FISHER: Your Honor, plaintiffs would offer
21 Exhibit 233.

22 MR. SULKIN: No objection, your Honor.

23 THE COURT: 233 is admitted.

24 (Exhibit(s) 233 admitted.)

25 BY MR. FISHER:

1 Q Let's talk a little bit about -- have you had a chance to
2 review Exhibit 233?

3 A Yes.

4 Q Okay. Let's talk a little bit about the issues that you
5 raised in this August 2007 letter, okay? Can you look at
6 that and just describe generally what your main points are in
7 this e-mail?

8 A We were specifying that Mr. Calliari is a representative
9 of the shareholders during that entire period and we were
10 very worried about the EBITDA, which is earning. And we said
11 also explicitly, we don't see the point of reducing the price
12 for Unilever, as they were paying much lower price than the
13 other customers. And we did not want any deviation from the
14 spirit of the contract which we have signed with Sargento,
15 and that I was willing to come, if necessary, to talk about
16 all this with all concerned parties.

17 Q So the suggestion that you made up a concern about
18 operational control in the spring of 2008 because earnings
19 were looking bad by that point, is that a fair
20 characterization?

21 A I did not have any figures, but I knew that they were
22 going -- early 2008 I learned that they are amending the
23 prices of the contract. And I said also to Mr. Calliari
24 that, really, we disagree very much on this point.

25 Q So after the summer of 2007, what's the next time that you

1 recall hearing about a proposal to amend the Unilever
2 contract?

3 A Sometime early 2008.

4 Q Okay. And what did you do in response when you heard that
5 Sargento had resumed this effort?

6 A I insisted coming to Bellingham Cold Storage to see the
7 different managers of the site.

8 Q So you made a trip to the States for a meeting, is that
9 correct?

10 A Yes.

11 Q Okay. What was the approximate date of your trip over?

12 A It was in March 2008.

13 Q Okay. Who did you meet with when you came over in March
14 of 2008?

15 A Mr. McEvoy, who was the representative of Sargento
16 Portionables, and the financial officer, as well as the plant
17 manager and the commercial vice president for marketing and
18 sales.

19 Q Okay. What did you discuss with Mr. McEvoy when you
20 visited the plant in March of 2008?

21 A Well, I was telling him that Mr. Calliari has lost the
22 control. We have no elements. We know nothing about what's
23 happening. One thing is sure, is that amending the contract
24 of Unilever, on this point totally we're adamant about it.
25 And we insisted heavily on our concern that, you know, it

1 should not have been done this, or allowed, and Mr. Calliari
2 was losing the control totally of the operation.

3 Q What did Mr. McEvoy say in response when you gave these
4 concerns?

5 A Mr. McEvoy told me that it's none of his concern -- not
6 concern. It's not for him to give me an answer, I should
7 write a letter directly to the CEO of the company, which was
8 Mr. Gentine.

9 Q Did he respond to any of the concerns that were discussed
10 about operational control?

11 A No.

12 Q After the meeting with Mr. McEvoy in Bellingham on these
13 issues, what did you do next?

14 A Well, I came back to Seattle, and we went to see our
15 lawyer. And we asked him to write a letter.

16 Q Okay. Can I ask you to look at Exhibit 13 in this case.
17 Do you have Exhibit 13 in front of you?

18 A Yes, I do.

19 Q Do you recognize Exhibit 13?

20 A Yes, I do.

21 Q And what is Exhibit 13?

22 A It's a letter which was sent to Mr. Henkle, the lawyer of
23 Sargento.

24 Q And is this the letter that you prepared in response to
25 your meeting with Mr. McEvoy?

1 A Yes.

2 Q And what was the purpose of preparing this letter?

3 A It's to remind Sargento that Mr. Calliari is losing the
4 control, the operational control of the company, and we have
5 raised all the issues on which we disagree, meaning the
6 contract with Unilever, the SPA, all the issues on which we
7 are disputing.

8 MR. FISHER: Your Honor, plaintiffs offer Exhibit 13.

9 MR. SULKIN: No objection, your Honor.

10 THE COURT: 13 is admitted.

11 (Exhibit(s) 13 admitted.)

12 BY MR. FISHER:

13 Q Mr. Ioannides, what did Sargento do in response to this
14 letter that had been requested?

15 A To my knowledge, nothing.

16 Q Now, there has been a suggestion that nothing happened in
17 April and May of 2008 after these disputes began surfacing.
18 Can you tell us about what did happen during that period of
19 time?

20 A Something had happened, because I know I came all the way
21 from Paris to Chicago to discuss with the mediator. I've
22 accepted the fact to have a mediator and to see if he can
23 find a solution. And so I came all the way to Chicago with
24 Mr. Calliari to discuss.

25 Q So between the time that the letter went out and May, when

1 there was a resignation letter, the parties participated in a
2 mediation, is that correct?

3 A That is correct.

4 Q In an effort to address the issues that had been raised by
5 you and Mr. Calliari?

6 A Yes.

7 Q Okay. And we're not going to talk about what happened
8 there. The matters were not amicably resolved, is that
9 correct?

10 A No.

11 Q Okay. What ultimately happened?

12 A Mr. Calliari has sent a letter for his resignation.

13 Q And is that a decision you supported?

14 A Yes, I did.

15 Q Okay. And why is that?

16 A Because he lost total control, operational control of the
17 company, and he had no choice.

18 Q Now, finally, before we wrap up, I want to spend just a
19 couple minutes talking about this decision with respect to
20 Unilever, okay?

21 A Uh-huh.

22 Q Let's talk briefly. Can you describe the experience that
23 you personally have had with Unilever?

24 A Yeah. Okay. I am working with Unilever. Unilever is an
25 Anglo-Dutch conglomerate, well known in Europe. And they

1 have too many factories. And I've been working with them for
2 many, many, many years. I have launched the concept of
3 Portionable in Italy. It was a success story with them. And
4 I'm in contact with a lot of people in the Unilever group,
5 among them an important CEO, ex-CEO, for all the frozen
6 sector in the group.

7 And the policy of Unilever was the following: Is that
8 they were shutting many, many factories. And they were
9 concentrating on their main branch, and they are working more
10 and more with subcontractors. And this is -- you can have
11 access to all this information in the newspaper and magazine.

12 And so the objective at Unilever is not to manufacture for
13 themselves, because that was the policy made by the chairman
14 of the company. And we have launched the concept with them,
15 which is working. And then they transfer this concept to the
16 USA. Unilever Italy transferred this concept to Unilever
17 USA. And they were delivering to them the sauces of Italy,
18 which were extremely expensive. This is why they wanted to
19 do it locally.

20 So Unilever is an important customer, but they have
21 interest to work with subcontractors to keep subcontractors
22 alive, because otherwise they are scared of us going direct
23 to the retail market and producing the same products, because
24 we can get 30 to 40 percent cheaper. So the interest of
25 Unilever is to keep people like us alive.

1 Q So when you say you can take your products direct, you can
2 sell them to Wal-Mart and their generic brand?

3 A Yes. Because Mr. Calliari told me that we were contacted
4 by Wal-Mart to produce certain items which they were buying
5 from Unilever under their own brand. We can do it because
6 all the other ingredients are commodities, meaning we can buy
7 them from wherever we want.

8 But the most important issue is the sauces which
9 Portionable was producing. So we can do the same thing as
10 Unilever at a much lower price if ever they threatened to
11 quit us.

12 Q So in summary here, what were your views on whether the
13 Unilever contract should be amended in the spring of 2008?

14 A We should have never done it.

15 Q And at the end of the day, if there's a dispute over a
16 decision like that, whose decision is that?

17 A Mr. Calliari's.

18 MR. FISHER: Thank you. Nothing further, your Honor.

19 THE COURT: Any cross-examination?

20 MR. SULKIN: Yes, your Honor.

21 CROSS-EXAMINATION

22 BY MR. SULKIN:

23 Q Good morning, Mr. Ioannides. I don't think we've met
24 before.

25 A No. Good morning.

1 Q My name is Bob Sulkin. I have a few questions for you
2 this morning. You talked about a Trial Exhibit 3. That is a
3 stock purchase agreement. You were not involved in this?

4 A As I said yesterday, I was -- on the major issue, I was,
5 not directly, but indirectly, with Patrick Calliari.

6 Q I'm sorry if my question wasn't clear enough. You were
7 talking to Mr. Calliari, but you did not negotiate this
8 agreement with Sargento?

9 A No.

10 Q Okay. You did sign the agreement?

11 A I did.

12 Q And so you are bound by it, fair enough?

13 A Exactly.

14 Q Okay. And you were not involved in negotiating Exhibit
15 No. 2, which is the employment agreement?

16 A No.

17 Q And you had a good law firm representing you when you
18 signed the stock purchase agreement?

19 A Sorry?

20 Q You had a law firm that represented you?

21 A Yes.

22 Q Okay. And you were satisfied with their work?

23 A Yes.

24 Q You knew Mr. Calliari had a separate employment agreement,
25 right?

1 A I knew, yes, that he had another employment agreement,
2 yes.

3 Q And you didn't know the details of that agreement, did
4 you?

5 A No.

6 Q You have not seen the details of that contract?

7 A No, only he told me -- the only question I have asked him
8 at that time is -- his contract is his private business. The
9 only question I have asked him is the operational control of
10 the company. And he told me that he had it.

11 Q And that's all you knew?

12 A Yes.

13 Q All right. And so that we understand, Exhibit 2, he told
14 you, was his private concern, not your concern?

15 A No. I told him my concern was -- was/is the operational
16 control. And, also, on top of it, he told me he had a
17 contract of five years with Sargento.

18 Q But you understood that Mr. Calliari had agreed to serve
19 under the direction of Mr. Gentine?

20 A Well, yes, but with one condition. During the earnout
21 period, he had the operational control of Portionable.

22 Q You understood that Mr. Calliari agreed to perform those
23 duties assigned to him by Mr. Gentine?

24 A Assigned to him? He has the control, operational control,
25 with some exception, which we have mentioned yesterday,

1 meaning he has to abide by certain rules regarding, as
2 mentioned yesterday, the investment and selling the shares
3 and so forth.

4 Q My question, though, is: You understood Mr. Calliari was
5 to serve under Mr. Gentine?

6 A That's yes, but with having the power of the operational
7 control.

8 Q And you understood that Mr. Calliari was to be seen as a
9 division head?

10 A A division head, during the earnout period he is having --
11 he is the CEO of Portionable, which interests us. And after
12 that period, he becomes a president of a division and abiding
13 by the rules of Sargento.

14 Q In fact, you agreed to Exhibit No. 2, didn't you, sir?

15 A No. 2? You are talking about the contract?

16 Q Yes, his employment contract.

17 A As I told you, I haven't read it. But these are the main
18 lines which Mr. Calliari gave me on the phone. And on this
19 issue I was agreeing with him, on that, provided he doesn't
20 lose the operational control. He signs whatever he wants.

21 Q But you yourself signed on to Exhibit No. 2; you are
22 legally bound to Exhibit No. 2. Did you understand that?

23 A You are talking about his contract?

24 Q Yes.

25 A No, this does not mean that. It doesn't concern me,

1 because I haven't seen it. I was telling you how I knew
2 about this contract. He gave me the headlines, about he's
3 going to work five years, he has the operational control of
4 the company. And about his salary, about all the other
5 details, it's his concern.

6 Q You know nothing of what was discussed between Mr. Gentine
7 and Mr. Calliari about the scope of his operational control
8 under Exhibit No. 2, his employment contract, do you, sir?

9 A No.

10 Q Let's take a look, if you would, at Exhibit No. 3. That
11 is the stock purchase agreement. If you would look at page
12 45 of the document, paragraph 9.9.

13 A 9.9?

14 Q Are you there?

15 A Yeah.

16 Q Okay. It reads: This agreement, meaning the stock
17 purchase agreement, together with the additional agreements,
18 comma, the company disclosures, comma, the exhibits and other
19 writings referred to herein or delivered pursuant hereto
20 constitutes the entire agreement among the parties and
21 supersedes any other agreements.

22 Do you see that?

23 A Okay.

24 Q I need an answer. Do you see that?

25 A Yes, I can read it, yes.

1 Q Okay. And you agreed to that?

2 A Yes.

3 Q Okay. Now, if you would, let's take a page. We need to
4 figure out what additional agreements means, right? Let's
5 look at page 38 of the document. Additional agreements means
6 the escrow agreement, the Calliari employment agreement, and
7 the management team employment agreements, and all other
8 agreements and documents contemplated by this agreement. Do
9 you see that?

10 A Yes, I see it, yes.

11 Q So we can agree that you were bound by Mr. Calliari's
12 employment agreement? That was part of the deal?

13 A Yes.

14 Q Okay. Now let's take a look at that agreement, Exhibit
15 No. 2. Do you have it in front of you, sir?

16 A I have it here on the screen.

17 Q Okay. Fair enough. All right. Let's take a look, if you
18 would, at paragraph No. 3, duties. And it says:

19 Executive -- that means Mr. Calliari -- shall serve as the
20 president, Portionables division of the corporation, and
21 will, under the direction of the corporation's president and
22 chief executive officer, use reasonable best efforts to
23 perform his duties as assigned by the president and chief
24 executive officer.

25 Do you see that?

1 A Yes.

2 Q And you understood that was the deal?

3 A Yes.

4 Q And if we go to the second page of the document, sir --
5 and certainly feel free to read anything. If we go to the
6 fifth line down -- sixth line down. Sorry. Do you see the
7 word "throughout"?

8 A Okay.

9 Q It reads: Throughout the employment period, not just the
10 earnout period, throughout the employment period the
11 executive shall have the duties, responsibilities, and
12 obligations that are not inconsistent with that of a division
13 president and/or executive officer of the corporation.

14 Do you see that?

15 A Uh-huh.

16 Q I need a "yes" for the court reporter.

17 A Yes.

18 Q Okay. You never knew about this provision? You never
19 read it before?

20 A No, I have not read it. I never read the contract. But
21 excuse me to interrupt you.

22 Q Well, let me just finish my question. And you had no
23 discussions with Mr. Gentine or anyone over what the duties
24 of a division president are, did you?

25 A No.

1 Q And you never spoke to a division president to know what
2 they do, correct?

3 A No.

4 Q And you understand that Sargento is a big company that
5 Mr. Gentine runs, fair enough?

6 A Yes.

7 Q Okay. Now, you did say -- if we look at paragraph number
8 -- let's go to page No. 7 if we could.

9 A No. Excuse me. You told me if I want to make a comment
10 about the reading.

11 Q Sure.

12 A You would not let me finish. So please allow me to do it.

13 Q Sure.

14 A Under the contingent payment due date, under the purchase
15 agreement, executive shall serve as president of Portionable
16 and shall have operational control of the Portionable
17 business, subject to the limitation in the purchase
18 agreement.

19 Q Understood. That's what it says.

20 A But it's an important element for me. This is the main
21 issue.

22 Q I understand. But you understood that he was a division
23 president?

24 A I learn now he's a division. I did not participate in the
25 contract, as I told before.

1 Q Right. And Mr. Calliari never told you in all your
2 discussions that he was being akin to a division president,
3 did he?

4 A No. He told --

5 Q Thank you. Now let's take a look at page 7, if you would.
6 And it says, termination provision. Do you see that?

7 A Uh-huh.

8 Q And then if we go to the next page, there's a good reason
9 provision up at the top. Do you see that?

10 A Yeah.

11 Q Now, again, you've never seen this provision before, have
12 you?

13 A On this contract, I've never seen it.

14 Q Okay. So I'm not going to question you about it any
15 further than to read it and question you about it, and we'll
16 go from there. It says: Good reason. Termination for good
17 reason shall mean a termination of executive's -- that means
18 Mr. Calliari's -- employment by executive, meaning
19 Mr. Calliari, following a material breach by the corporation
20 of any provisions of this agreement, which failure continues
21 for a period of 30 days after the corporation's receipt of
22 written notice from the executive, meaning Mr. Calliari,
23 specifying the details of such alleged failure.

24 Do you see that?

25 A Yes.

1 Q And you were unaware of Mr. Calliari ever sending notice
2 prior to the spring of 2008 under this provision?

3 A No.

4 Q All right. Now, you did refer to the letter you wrote,
5 which is Trial Exhibit 13. Let's take a look at that.
6 That's the letter dated March 28 from your lawyer,
7 Mr. Weinstein, to Mr. Hinkle.

8 A Yeah.

9 Q And in this letter, you can go to the second page of the
10 letter, sir. I'm going to start toward the middle and we'll
11 work up, okay? So let's start with that first bullet point,
12 Bellingham Cold Storage. You write: One area of loss of
13 operational control was, quote, the refusal of Sargento to
14 allow direct shipment of goods from the cold storage facility
15 of Bellingham Cold Storage resulting in substantial loss. It
16 is likely now too late for this change -- for this change to
17 have a meaningful impact on the contingent payment.

18 Do you see that?

19 A Yes.

20 Q Now, you had no personal contact with Bellingham Cold
21 Storage?

22 A I had it at the beginning when I built the factory, that's
23 all.

24 Q But on this issue you had no --

25 A No.

1 Q Okay. And you were not involved in resolving any
2 disagreements with Bellingham Cold Storage?

3 A No.

4 Q And you did not see any plan provided by Mr. Calliari for
5 direct shipping? You never saw such a plan?

6 A No. He was only informing me on the phone.

7 Q And you don't know if a plan was ever created by
8 Mr. Calliari, do you?

9 A I did not see the way he was presenting things, so I don't
10 know.

11 Q You would expect Mr. Calliari to present the plan if he
12 was considering to direct ship, wouldn't you, sir?

13 A I had confidence in him. He's the CEO, and I'm the CEO in
14 France. So he knows what he's doing. I'm not supposed to
15 ask him questions.

16 Q My question's a little different. You would have expected
17 Mr. Calliari to present a plan if he was going to direct
18 ship?

19 A Personally, not necessarily.

20 Q Okay. Let's take a look, if you would, at your deposition
21 transcript.

22 MR. SULKIN: Your Honor, may I approach with the
23 transcript?

24 THE COURT: Ladies and gentlemen, this is the first
25 time we've used a deposition. A deposition is a sworn

1 statement by the witness given in front of the attorneys for
2 each side. It's then transcribed and written down by the
3 court reporter.

4 MR. SULKIN: Your Honor, if I may, I would like --
5 there's an objection interposed here. So I would like
6 perhaps you to read to make sure that you don't think I'm
7 overstepping my authority. I'm on page 59, your Honor, lines
8 14 to 17, and page 60, lines 7 through 9.

9 MR. FISHER: I'm sorry. Could you repeat that?

10 MR. SULKIN: Sure. 59, lines 14 to 17, page 60,
11 lines 7 through 9.

12 THE COURT: Go ahead.

13 MR. SULKIN: Thank you, your Honor. Would you please
14 play for me clip number AI15.

15 (Video played, not reported.)

16 BY MR. SULKIN:

17 Q Now, you testified about Exhibit 233, sir. I would like
18 you to take a look at it.

19 A Which is Exhibit 233, sir?

20 Q This is the e-mail you sent on August 12th to
21 Mr. Calliari. You testified about that to Mr. Fisher.
22 First, you did not speak to Mr. Gentine about your concerns,
23 did you?

24 A No. I didn't have any contact with Mr. Gentine. I didn't
25 even know him.

1 Q I'm not blaming you. I'm just asking. And you did not
2 get confirmation from Mr. Calliari that he even spoke to
3 Mr. Gentine about your concerns?

4 A I did not ask that question. I know that Mr. Calliari has
5 spoken to Mr. Gentine about his disagreement about the
6 contract. He told me that.

7 Q You understood, Mr. Calliari understood what was in his
8 employment contract?

9 A I'm referring on the stock purchase agreement. We're
10 talking about -- you asked me if Mr. Calliari informed me
11 about his disagreement with what Mr. Gentine was asking him
12 to do.

13 Q My question is a little different. The employment
14 agreement was important to Mr. Calliari; you understood that?

15 A Okay. It's important for him, yes.

16 Q And you have no doubt that he understood his rights under
17 that agreement, right?

18 A Under that agreement and under the SPA.

19 Q Okay. And my only question to you is: You've never seen
20 any notice that Mr. Calliari gave to Mr. Gentine about his
21 concern?

22 A No.

23 Q Okay. Now, you talk about in your letter, which is
24 Exhibit No. 13, if we can go back to that, the second page,
25 sort of at the top, your first sentence says: Sargento has

1 excluded Mr. Calliari from these discussions with Unilever,
2 although he negotiated the initial agreement with Unilever.

3 Do you see that?

4 A Yes.

5 Q And it was Mr. Calliari that told you that he had been
6 excluded?

7 A Yes.

8 Q Did Mr. Calliari tell you that he was the one that called
9 Unilever and communicated a reduction in price of the initial
10 offer from 39 cents a pound to 35 cents a pound?

11 A The only thing I knew is that the first time he sent the
12 offer he was compelled to do it.

13 Q My question is a little different. Did he tell you that
14 he made the initial call to Unilever and said he would be
15 willing to reduce the price?

16 A I do not recollect that he told me that, that he told them
17 on the phone.

18 Q You were not aware he told them in any manner, were you,
19 sir?

20 A Sorry?

21 Q You weren't aware that he told Unilever in any manner,
22 whether by phone or e-mail, that he was willing to reduce the
23 price?

24 A No. He told me that he reduced the price, but I don't
25 know how much, when he made the first offer. It was sent by

1 Sargento. He had to accept the signature of that offer.

2 Q And when you wrote Exhibit 233, which is that August 12th
3 memo, e-mail, you didn't know that Unilever had threatened to
4 self-manufacture the product if it didn't get a reduction in
5 price, did you?

6 A No, but I did not -- it didn't come even to my mind,
7 because information I had from Europe is different from
8 yours.

9 Q Maybe my question isn't clear. You didn't know that
10 Unilever had threatened to self-manufacture if it did not get
11 a reduction in price?

12 A No.

13 Q Mr. Calliari didn't tell you that?

14 A Not to my knowledge.

15 Q And it's fair, sir, that you have no idea what Unilever
16 would have done in that circumstance, do you?

17 A See, having the information from my side, I would not
18 even, I mean, thought about this, because I have different
19 information than yourself.

20 Q You had not sold a product to Unilever since 2002, isn't
21 that right?

22 A Yes.

23 Q You can't recollect the last time you spoke to anyone at
24 Unilever, isn't that right?

25 A No. As I told you, I was in contact with somebody of

1 importance, which was an ex-CEO which resigned two years ago
2 as the chairman of Unilever France. And also he was the
3 ex-CEO for all the frozen division of Unilever. And we were
4 discussing about the situation. And the newspaper also was
5 giving us the right information. So I knew what's happening
6 in Unilever, even if I stopped working with them directly on
7 shipping products since 2002.

8 Q Would you take a look at your deposition, sir? You took a
9 deposition under oath, is that right?

10 A Yes.

11 Q And you told the truth, right?

12 A Yes.

13 Q Okay. And that was back on October 25, 2009, relatively
14 recently?

15 A Yes.

16 Q Okay. If you would take a look at page 72, lines 2
17 through 4, and page 72, lines 12 through 15.

18 MR. SULKIN: Your Honor, I don't think there are any
19 objections to these, so I ask we be allowed to play that
20 clip.

21 MR. FISHER: What are they?

22 MR. SULKIN: Sure. 72, lines 2 through 4, and 72,
23 lines 12 through 15.

24 THE WITNESS: Excuse me. I have -- go ahead.

25 MR. FISHER: Your Honor, if we're reading these in,

1 for completeness, I would ask that the following four lines
2 on page 72 be read along with the excerpt that's cited by
3 Mr. Sulkin. On page 72, lines 2 through 4, I'm asking for
4 lines 5 through 8.

5 MR. SULKIN: I have no objection to him reading that
6 in, your Honor, after we play the clip.

7 THE COURT: Go ahead.

8 MR. SULKIN: Okay. Why don't you play the clip.

9 (Video played, not reported.)

10 MR. SULKIN: Why don't you read, and then we'll play
11 the next clip.

12 MR. FISHER: Do you want to give the parenthetical?
13 Was it in the last year? It says: No audible response.
14 Last two years?

15 You want to read your answer on line 8, page 72, line 8 of
16 your deposition?

17 THE WITNESS: Yes. I have regular contact with them.

18 MR. FISHER: Thank you.

19 THE WITNESS: Excuse me. I was trying not to divulge
20 the names. And after a long discussion --

21 THE COURT: Sir. There's no question before you
22 here.

23 THE WITNESS: Sorry.

24 MR. SULKIN: And then lines 9, 10, 11, read, and then
25 we'll pick up at 12: What does that mean, regular contact?

1 When was the last time you talked to somebody there? Answer:
2 I cannot recollect.

3 Now let's pick up, please.

4 (Video played, not reported.)

5 BY MR. SULKIN:

6 Q Now, you weren't aware that under the new Unilever
7 contract -- let me rephrase it. You were not aware that the
8 new Unilever contract guaranteed a minimum level of
9 production that was higher than the previous levels had been?
10 You weren't aware of that, were you, sir?

11 A I was involved only on the price, on the price issue with
12 the contract. And Mr. Calliari was supposed to follow that.

13 Q I'm sorry. I understand what you're saying, but I'd like
14 an answer to my question, with due respect. Let me read it
15 again to you and see if I can get an answer.

16 A Okay.

17 Q You weren't aware that under the new proposed Unilever
18 contract you guaranteed a minimum level of production that
19 was greater than the previous level of production? You
20 weren't aware of that, were you?

21 A I can't recollect.

22 Q And Mr. Calliari never told you that, did he?

23 A He spoke with me very often, but I cannot recollect the
24 volume, the exact volume at the present moment.

25 MR. SULKIN: Your Honor, I would like to play another

1 clip of that. It's at page 75. There's an objection there.
2 Lines 13 through 21.

3 THE COURT: Mr. Fisher.

4 MR. FISHER: Your Honor, I'm not clear on the purpose
5 of having him read this.

6 THE COURT: It's not impeaching.

7 MR. SULKIN: What he answered, if I may, your Honor,
8 was: I don't recollect today. Here, he doesn't even give an
9 answer. So there is a difference, I think.

10 THE COURT: You are correct. Go ahead.

11 MR. SULKIN: Thank you, your Honor.

12 (Video played, not reported.)

13 BY MR. SULKIN:

14 Q And you weren't aware that the projected volumes with
15 Unilever under the new contract were going to result in
16 higher revenues to Portionables than those that would have
17 been under the previous contract? You didn't know that, sir,
18 did you?

19 A I did not have the figures in front of me.

20 MR. FISHER: Your Honor, can I object that it assumes
21 facts not in evidence?

22 THE COURT: Overruled.

23 BY MR. SULKIN:

24 Q Mr. Calliari didn't share that information with you, did
25 he, sir?

1 A I cannot recollect. I knew that we were -- the prices
2 were lower, that's for sure. But I didn't have the details
3 of the contract.

4 Q And so you wrote Exhibit 13, or your lawyers wrote that,
5 without having a full understanding of what was going on at
6 Unilever, isn't that correct?

7 A Even ourselves, we did not have elements in front of us.
8 But we knew that you were amending the prices of the
9 contract. Personally, this is what I knew about it. And we
10 talked about the principle of sending a letter saying you
11 don't have to modify the price, without going into too much
12 detail, because I didn't have all the details.

13 Q I'm sorry if my question wasn't clear. My question was:
14 You sent Exhibit 13 through your lawyers without having full
15 knowledge and understanding of the situation relating to
16 Unilever, isn't that correct?

17 A No. I wrote that we were amending, so I was aware that
18 you are changing the price. That's all. But going into
19 detail, I haven't got the contract in front of me to discuss
20 the offer you made. I hadn't had it in my hand to be able to
21 answer you on facts and figures. I knew that you were
22 amending and you were in negotiation with them. I was
23 replying on the principle that you are not supposed to do it.

24 Q And Unilever was a big percentage of the products being
25 manufactured at the Bellingham plant; you understood that,

1 did you not?

2 A Yes.

3 Q And if Portionables lost Unilever's business, that would
4 have been a significant problem for Portionables?

5 A Of course, yes.

6 MR. SULKIN: Your Honor, that's all the questions I
7 have.

8 Thank you, Mr. Ioannides.

9 THE COURT: Any redirect?

10 MR. FISHER: Just a few, your Honor.

11 REDIRECT EXAMINATION

12 BY MR. FISHER:

13 Q Mr. Ioannides, I would like to take you back to Exhibit 2,
14 which is the employment agreement that Mr. Sulkin showed to
15 you.

16 A Yes.

17 Q On page 2 of the employment agreement, about how things
18 would be run during the earnout period, towards the top of
19 the page, can you read into the record what the employment
20 agreement provides on that subject?

21 A Executive officer of the corporation, until the contingent
22 payment due date under the purchase agreement, executive
23 shall serve as president of Portionables, and shall have
24 operational control of the Portionable business subject to
25 the limitations in the purchase agreement.

1 Q What are the limitations in the purchase agreement under
2 operational control?

3 A It's in 1B of the SPA, which states that any increase of
4 capital or selling shares or investing in heavy machinery,
5 they should have the consent -- there were six items which
6 limited the power of Mr. Calliari, meaning that he has to
7 refer to Sargento before taking a position in that direction.

8 Q So your understanding is these limitations are the same
9 ones that were specified in the stock purchase agreement?

10 A Yes, I do.

11 Q Okay. And there were some questions about your
12 recollection and the specifics of when you last spoke to
13 someone at Unilever. Your deposition in this case was taken
14 a couple months ago, correct?

15 A Yes.

16 Q We're talking about events that took place a couple years
17 earlier, correct?

18 A Yes.

19 Q And so when you're talking about the last time you recall
20 discussing Unilever's plans or anything of that nature,
21 that's years earlier than what we're talking about here?

22 A Yes. But if you want to go into more details, even the
23 ex-CEO, who lives close to my place and we sit having dinner
24 together, so I know what's happening. And I didn't want to
25 divulge information.

1 MR. FISHER: Okay. Thank you, your Honor. Nothing
2 further.

3 MR. SULKIN: No further questions.

4 THE COURT: Ladies and gentlemen, do any of you
5 jurors have a question for the witness? If you do, please
6 write it out and pass it to the end of the row.

7 Thank you, sir. You may step down.

8 Next witness, please.

9 MR. GOLDFARB: Your Honor, the plaintiff calls
10 Mr. Gentine.

11 THE COURT: Mr. Gentine, please come forward.

12 (Witness sworn.)

13 THE COURT: Please have a seat, sir.

14 LOUIS GENTINE,
15 being first duly sworn, the witness was called and testified
16 as follows:

17 DIRECT EXAMINATION

18 BY MR. GOLDFARB:

19 Q Good morning, sir.

20 A Good morning.

21 Q Would you state your full name for the record.

22 A Louis P. Gentine.

23 Q Where do you reside, sir?

24 A Elkhart Lake, Wisconsin.

25 Q How are you employed?

1 A I'm employed at Sargento Foods, Incorporated, as the
2 chairman and chief executive officer of the company,
3 president.

4 Q Sargento is a family-run business, is that correct?

5 A It's a family-owned business, yes, and a family-run
6 business, since I'm the CEO and a member of the family.

7 Q And a gentleman who is a witness in this case, Mr. McEvoy,
8 has married into your family; is that also correct?

9 A Mike McEvoy is married to my brother Larry's daughter
10 Nicole. So he's married not into my direct family but into
11 my brother's family. But the entire Gentine family, I guess
12 you would be correct.

13 Q He's married to your niece, is that correct?

14 A My niece.

15 Q And Mr. McEvoy is who you sent out to work with
16 Portionables after the acquisition and actually moved to
17 Bellingham, is that correct?

18 A Yes. We sent him out to help with the transition of the
19 acquisition, with Mr. Calliari's approval.

20 Q Sir, let me start at the beginning. The interest that
21 Sargento had in acquiring Portionables came from the Sargento
22 side, isn't that true?

23 A Versus someone from Portionables calling us up and asking
24 if we would like to buy them?

25 Q Yes, sir.

1 A Absolutely, it came from our side.

2 Q And what happened was that in the later part of 2006,
3 Sargento conducted a lengthy industry study and preliminary
4 assessment and identified Portionables as a desirable
5 strategic partner, isn't that true?

6 A Yes.

7 Q And at that time you understood that Portionables was
8 likely not for sale, isn't that also true, at the time you
9 made your first overture to the company?

10 A We actually wouldn't have, I don't believe, understood
11 that. But we didn't know that they were for sale, so we were
12 just asking whether they would be interested.

13 Q And at that time your company had earmarked the sauce
14 business as a significant platform for future growth, isn't
15 that true?

16 A Actually, yes, but our company was actively involved in
17 the sauce business through other operations already at that
18 time.

19 Q You had a manufacturing plant in a location called
20 Hilbert, is that correct?

21 A Yes, we did.

22 Q And what you wanted to do was significantly expand your
23 presence in the sauce market, isn't that true?

24 A Presence and capabilities.

25 Q And you saw the combination of Portionables and Sargento

1 as something which was one plus one might be worth more than
2 two, isn't that true?

3 A Yes.

4 Q And you had your CFO, Mr. George Hoff, initially try to
5 contact Mr. Calliari to set up a meeting to see if there
6 would be interest on Mr. Calliari's part in selling the
7 business, isn't that true?

8 A Yes.

9 Q And Mr. Calliari didn't respond to those initial calls.
10 And the next thing that happened was that you had another
11 employee named Bob Clouston try to reach out and contact
12 Mr. Calliari, isn't that also true?

13 A Yes, that's true.

14 Q And Mr. Clouston you selected to contact Mr. Calliari
15 because you understood that they had done business in the
16 past together, isn't that correct?

17 A Bob had told us that, yes, he had had a relationship and
18 knew Patrick Calliari.

19 Q So if someone were to come to this court and say that what
20 happened in this case was that Portionables reached out and
21 found Sargento, that's simply not what happened here, isn't
22 that true?

23 A I would say that's true.

24 Q Sargento found --

25 A Oh, they ended up finding us, but because of our inquiry.

1 Q You found them is what happened?

2 A Yeah, uh-huh.

3 Q Let me talk to you for a moment about the basic
4 transaction here in very general terms so that we can make
5 sure that we can all understand it.

6 The first thing that Sargento agreed to do was pay 19
7 million dollars for the purchase of Portionables, plus a
8 contingent payment, correct?

9 A Well, I don't want to say it's the first thing, but it's
10 part of the agreement, that we would pay them 19 million
11 dollars plus a contingent payment.

12 Q Okay. And just to be clear, what I'm saying is the
13 purchase price had two parts to it. It was 19 million in
14 cash plus this contingent payment, correct?

15 A A potential contingent payment, correct.

16 Q And the contingent payment could be up to 25 million
17 dollars, is that also correct?

18 A Yes.

19 Q And how did you arrive at the sum of 19 million dollars
20 for the cash portion of the transaction?

21 A Well, we looked at the opportunity that Portionables
22 provided us, again, looking at expanding our capabilities, et
23 cetera, the fact that they had some business with people that
24 we weren't dealing with, but potentially business with some
25 others that we were. And although their earnings were pretty

1 insignificant and disappointing at that time, we felt that,
2 bringing the two companies together, that we felt we could
3 justify a price of 19 million dollars.

4 Q And, in fact, you were aware while you were negotiating
5 with Portionables that there was a French company that was
6 also interested in buying it, isn't that true?

7 A We had heard from them that there was a French company.
8 And I think it was mentioned the other day in somebody's
9 opening, that there was a French company that was also
10 negotiating with them. And we were never privy to any
11 documentation to prove that was true or anything like that.
12 It's just what we were told.

13 Q Well, in point in fact, you asked to see the terms of that
14 transaction, did you not?

15 A I don't recall asking, that I personally asked to see the
16 terms of the transaction. I could have. I don't know that I
17 ever saw them.

18 MR. GOLDFARB: Your Honor, move for the admission of
19 Exhibit 15, which is on the plaintiffs' list and for which I
20 understand there's no objection.

21 MR. SULKIN: No objection, your Honor.

22 THE COURT: 15 will be admitted.

23 (Exhibit(s) 15 admitted.)

24 BY MR. GOLDFARB:

25 Q Sir, Exhibit 15 you have before you?

1 A Yes, I do.

2 Q And this is an e-mail from a William Beard to Mr. Clouston
3 and yourself. Do you see that?

4 A Yes.

5 Q And it's dated January 29 of 2007. Do you see that?

6 A Yeah.

7 Q And does this document assist you in recollecting that you
8 were furnished by Mr. Beard the terms of the proposed
9 purchase which he identifies as an industry buyer?

10 A Again, I didn't see the terms from the company. Mr. Beard
11 in this memo told us what we were to believe were the terms.
12 I do see that. And, actually, I didn't recollect this. But
13 I didn't receive the terms from the company.

14 Q Okay. But you asked Mr. Calliari and his representatives
15 to provide you the terms of that transaction, and you got
16 this e-mail, isn't that correct?

17 A Yes, apparently so.

18 Q And you concede from this that the other buyer was
19 proposing a purchase price of 20 million dollars plus an
20 earnout. Do you see that?

21 A Yes.

22 Q Now, the transaction that happened here, you paid in cash
23 19 million dollars, correct, plus the earnout?

24 A Plus a signing and retention bonus to Packard. But 19
25 million dollars was for the shares.

1 Q So what happened, though, was that you matched the dollar
2 terms of the cash portion of the offer from the French
3 company by paying 19 million in cash to the shareholders and
4 an addition million dollars to Mr. Calliari under the
5 employment agreement as a signing bonus, isn't that correct?

6 A Signing and retention bonus.

7 Q And, in fact, isn't it true that the purpose of that
8 payment in part was because Mr. Calliari's employment
9 agreement was giving you a lengthy noncompetition agreement?
10 That was part of it, wasn't it, sir?

11 A Actually, it was discussed in preliminary information
12 going back and forth. But I believe that we actually covered
13 the noncompete portion for Mr. Calliari and all the
14 shareholders in the stock purchase agreement, assigning a
15 value of it of a couple hundred thousand dollars. And it
16 covered for seven years, which in effect was the same length
17 of time we were asking for in the employment agreement, as I
18 remember.

19 Q Do you not recall, sir, that the employment agreement also
20 contains a lengthy noncompetition agreement, along with some
21 additional restrictive terms?

22 A It absolutely does. But there wasn't a value attached to
23 it. There wasn't a need for a value attached because we had
24 covered it in the stock purchase agreement, I believe.

25 Q Let's talk about the contingent payment for a moment. The

1 contingent payment was based upon an accounting formula, is
2 that correct?

3 A Yes.

4 Q And could you attempt to explain to the jury in layman's
5 terms, if you can, how that worked? Just walk through the
6 mechanism of how the contingent payment was to be determined.

7 A Yeah. As Mr. Goldfarb indicated, we were paying cash of
8 19 million up front. And we told Mr. Calliari that if he hit
9 an EBITDA, which is Earnings Before Interest, Taxes,
10 Depreciation, and Amortization, of 21 million dollars, not
11 20,999,999, but 21 million dollars, we would in effect pay an
12 additional 1 million dollars.

13 Anything above 21 million dollars, we would pay six times
14 that amount. So, in effect, for the first 21 million
15 dollars, if you hit 21 and then hit that exactly that way, we
16 would have been paying a multiple of seven times. For
17 anything above 21 million dollars, up to a maximum of 4
18 million dollars in additional EBITDA, we would pay a ratio of
19 six times.

20 The reason we did that is, quite honestly, when you look
21 at acquisitions that happen, it isn't uncommon for them to be
22 a multiple of EBITDA relative to cash flow. It's based on
23 cash flow. Six times, quite honestly, wasn't a very high
24 multiple to pay. And yet, at the same time, we had to be
25 fair to Mr. Calliari and the other shareholders relative to a

1 price, or they wouldn't sell for us.

2 So we said, hey, if you can show us by concrete, real
3 performance that you can hit a number higher than that
4 number, really, higher than 19 -- if you got to 21, you got
5 an extra million, but above the 21, if you can show us that,
6 hey, we can hit these dollar amounts, we would be willing to
7 pay what we feel is a fair market price for that stream of
8 cash flow going forward. And he indicated, based on his
9 projections, that those numbers could be far exceeded.

10 I am the chairman and chief executive officer of the
11 company, but we do have a board of directors. And the board
12 of directors has four outside members on the board and three
13 inside members. There's three shareholder members, myself
14 and my two brothers.

15 And it was their feeling that there was no way that we
16 should pay for a pig and a poke type of thing that, well,
17 this guy's promising this, because in acquisitions, generally
18 the person that's selling the company, people often use a
19 profit projection that they call hockey stick. It's been
20 here, and suddenly it's going to start going up this way, and
21 you guys, by the way, should pay for the higher amount.

22 So they said, we can't pay for the higher amount. But if
23 Mr. Calliari can show us by actually earning a higher amount
24 that he deserves more than the 19 million dollars, we should
25 be willing to pay it.

1 Q All right. So, Mr. Gentine, let me stop you there for a
2 moment and go back to the mechanics of the calculation,
3 because the numbers you've presented are inconsistent with
4 what I understand the document says.

5 So let me show you page 2 of the stock purchase agreement.

6 MR. GOLDFARB: This is a part of Exhibit 3, your
7 Honor, which is admitted.

8 THE WITNESS: Is that going to come on my screen
9 here?

10 THE COURT: You'll get a hard copy as well.

11 THE WITNESS: Okay.

12 BY MR. GOLDFARB:

13 Q Sir, what's before you on the screen is Section 1.5(a) of
14 the stock purchase agreement. And that explains the manner
15 in which the EBITDA payment is to be calculated. Do you see
16 that?

17 A Yeah.

18 Q And your number, sir, confused me, because, as I
19 understand this formula, it works against a 3 million dollar
20 target, isn't that true?

21 A The 3 million dollar target would be where they would have
22 earned the initial -- the added 1 million dollars.

23 Q Right.

24 A Right. I thought you said that, 3. And then above the 3,
25 up to a maximum of 4, meaning 7 million in total, they would

1 earn the --

2 Q Let me start over, because I think you misspoke. You were
3 talking about 21. That's the number that doesn't compute
4 here. But let me start over and walk you through this
5 calculation and make sure we're all on the same page about
6 how this works.

7 A That's fine.

8 Q The EBITDA calculation is a fancy word for permits,
9 correct?

10 A As I said, it's Earnings Before Interest, Taxes,
11 Depreciation, and Amortization. It's actually more of a cash
12 flow financial thing.

13 Q Fair enough. And it's a measure of the company's
14 performance, correct?

15 A It's one measure of the company's performance, sure.

16 Q And the idea was that you were willing to pay 19 million
17 in cash to the shareholders, plus if the company proved out
18 in this earnings period to generate a certain amount of cash,
19 that you would pay for that as well, correct?

20 A Yes.

21 Q And what the company had to do was produce this EBITDA
22 number during the earnout period of at least 3 million
23 dollars, correct, before anything would be earned?

24 A Yes, the 3 million dollars. And that's where the 21 came
25 from. The 19, the additional 1 million we had paid, plus the

1 1 million for the signing and retention bonus, equaled 21.
2 That's where I came up with that.

3 Q Right now, sir, I'm just focused on how this contingent
4 payment works, not any of the other payments.

5 A All right.

6 Q So what happens is the company tries to make the earnings
7 target during the period of 3 million dollars, correct?

8 A Actually, the company would be trying to hit a number much
9 larger than that, so --

10 Q Right. But it starts to work, the contingent payment gets
11 triggered, at 3 million dollars?

12 A Yes.

13 Q Okay.

14 A Above 3 million dollars.

15 Q Okay. At 3 million and 1 dollar, what happens is you owe
16 another million dollars, correct?

17 A Actually, I believe it was 3 million, exactly 3 million,
18 that they would get the 1 million.

19 Q Okay. So if they get over the 3 million dollars, you
20 automatically owe another million to the shareholders,
21 correct?

22 A Yes.

23 Q And then for every dollar after that, you have to pay the
24 shareholders 6 dollars, correct?

25 A Absolutely.

1 Q Okay. So just do the math here. If what happened was
2 that the company had EBITDA in the period of 4 million
3 dollars, tell the jury what the amount would be.

4 A We would have paid them the extra 1 million dollars, and
5 we would have paid them an additional 6 million dollars.

6 Q So for every dollar during the earnings period that the
7 company exceeds 3 million dollars, it costs you another 6
8 dollars in payments to the shareholders, correct?

9 A Yes, because, again, the multiple, we're not expecting it
10 to be a one-year performance level. We're expecting that
11 that performance will continue forward. And that type of
12 cash flow off of a 6 million dollar investment is looked at
13 in many acquisition circles as very favorable cash flow, and
14 it should very easily cover the cost of that added
15 investment.

16 THE COURT: Counsel, can you come over to the sidebar
17 for just a minute? Actually, we're going to take our recess
18 instead.

19 Ladies and gentlemen, why don't you pack up your
20 notebooks, and you may go for your coffee break.

21 (Jury leaves courtroom.)

22 THE COURT: Please be seated. Counsel, I'm concerned
23 that the witness may have misspoken or misunderstood your
24 question here. The question was: So for every dollar during
25 the earnings period that the company exceeds 3 million

1 dollars, it costs you another 6 dollars in payments to the
2 shareholders, correct? Answer: Yes, because, again, the
3 multiple, we're not expecting it to be a one-year performance
4 level. We're expecting that that performance will continue
5 forward. And that type of cash flow off of a 6 million
6 dollar investment is looked at in many acquisition circles as
7 very favorable cash flow.

8 That implies that for every dollar over 3 million, they
9 are going to pay 6 million. Am I understanding that
10 correctly?

11 MR. GOLDFARB: You are, your Honor.

12 THE COURT: For every 1 dollar?

13 THE WITNESS: No, no.

14 MR. GOLDFARB: No, your Honor. It's a multiple of
15 six. So if they went 1 dollar over 3 million, they would owe
16 6 dollars.

17 THE COURT: Well, he just said 6 million.

18 MR. GOLDFARB: Against the 1 dollar.

19 THE COURT: Against the 1 dollar.

20 MR. GOLDFARB: So when we come back, your Honor, I'll
21 repose the question to make sure we get it clear.

22 THE COURT: Okay. Because as I understood it, they
23 would have to go a million dollars in order to get the 6
24 million dollars.

25 MR. GOLDFARB: That's correct.

1 THE COURT: Okay. Well, your record doesn't say that
2 right now.

3 All right. Anything else that we need to take care of
4 before we recess?

5 MR. GOLDFARB: No, your Honor.

6 THE COURT: Okay. We'll take our recess.

7 (Brief recess.)

8 THE COURT: All right. Are we ready to bring out our
9 jury?

10 MR. GOLDFARB: We are, your Honor.

11 THE COURT: All right. Let's have our witness come
12 back up and have a seat.

13 (Jury enters courtroom.)

14 THE COURT: Please be seated.

15 Go ahead, Mr. Goldfarb.

16 MR. GOLDFARB: Thank you, your Honor.

17 Q Mr. Gentine, before the break we were talking about how
18 this EBITDA calculation worked. And one of the things the
19 parties did here, to make sure everybody understands here, an
20 example is attached to the stock purchase agreement, isn't
21 that correct?

22 A Yes.

23 Q So if you go to page 000613 of the stock purchase
24 agreement, you'll see that.

25 A And that's what's on the screen as well?

1 Q It's what's on the screen as well, yes. And this just
2 shows in shorthand how the calculation would be done, isn't
3 that correct?

4 A Yes, it does.

5 Q And what I've circled there is the math. This isn't what
6 actually happened. This is just an example that the parties
7 attached to the agreement at the time it was made, correct?

8 A Yes.

9 Q Okay. What this shows us is, on the top line there, where
10 it says \$4,337,000, if the company, Portionables, during the
11 earnout period brought in that much EBITDA, then you would
12 subtract the 3 million dollar target, correct?

13 A Yes.

14 Q And that would leave the sum of a million 337, correct?

15 A Yes.

16 Q And then the calculation would be based on that
17 difference, which is the amount over the target, correct?

18 A Yeah. You take that number times six.

19 Q Right. And then you add another million dollars to it?

20 A Which again is the bonus of getting to that exact 3
21 million number, yes.

22 Q So as soon as you get to the 3 million, you get the 1
23 million dollar bonus, correct?

24 A Uh-huh.

25 Q And then every time you get over the 3 million dollar

1 number, the amount you get over it gets multiplied by six,
2 correct?

3 A Yes.

4 Q And that is the amount of the contingent payment that
5 would have to be paid to the shareholders for the earnout
6 period, correct?

7 A If indeed that was the results, that is what we would have
8 owed them as a contingent payment, yes.

9 Q And it depended on what actually happened, correct?

10 A Yes.

11 Q And it could be zero, isn't that correct?

12 A Yes.

13 Q But it could also be up to 25 million dollars, isn't that
14 also true?

15 A Yes.

16 Q And it depended solely on the performance of Portionables
17 during this earnout period, that's true, right?

18 A Yes.

19 Q And if Portionables didn't get to the 3 million dollar
20 number, then you wouldn't have to pay anything at all,
21 correct?

22 A Yes.

23 Q And it doesn't take very much over the 3 million dollar
24 number, as we can see here, if you get over it by 1.33
25 million, it generates a contingent payment of over 9 million,

1 correct?

2 A Yes.

3 Q So it has a big impact. Small changes in what happens
4 with EBITDA can cause big effects in terms of how much has to
5 be paid on the contingent payment because it's magnified by
6 six, correct?

7 A Well, it wouldn't be small changes. A million 337 is
8 still a big number for a lot of different people. But, yes,
9 it would obviously go up at a ratio of 6 to 1.

10 Q Now, we'll talk about this more as we go through your
11 examination today. But it's true, isn't it, that in April of
12 2008, there was a disagreement between you and Mr. Calliari
13 about amending the Unilever contract, isn't that correct?

14 A He raised an issue relative to the Unilever contract, yes.

15 Q The state of play as of April of 2008 was that
16 Mr. Calliari did not want to sign the Unilever amendment and
17 you did, isn't that correct?

18 A Yes.

19 Q And at the time of that dispute, that disagreement between
20 you and Mr. Calliari, the earnout period was still open,
21 wasn't it?

22 A We were in the midst of the earnout period.

23 Q It wasn't over yet, was it?

24 A No, it wasn't.

25 Q It didn't end until the end of December, 2008. That's

1 true, too, isn't it?

2 A Yes.

3 Q And as of April of 2008, you didn't know whether or not
4 Portionables would make the 3 million dollar target, isn't
5 that correct?

6 A I didn't absolutely know that they weren't going to hit
7 the target. But Patrick had conferred with our chief
8 financial officer, George Hoff, a name mentioned earlier, I
9 believe in January, and indicated that he didn't think there
10 was any way that they would hit any contingent payment due to
11 the projected performance.

12 Q Sir, my question is slightly different. Let's make sure
13 you understand it. My question is: As of April of 2008, you
14 did not know definitively one way or another whether or not
15 Portionables would hit that earnout target because you still
16 had another eight months to go, correct?

17 A Definitively, that's correct.

18 Q And some things happened in the spring and summer of 2008
19 that affected the EBITDA numbers at Portionables, isn't that
20 also true?

21 A Well, I'm not certain which things you are speaking of.

22 Q Let me be more specific. It's true, isn't it, that
23 approximately April of 2008, Birds Eye gave a significant new
24 order to Portionables for new products, isn't that true?

25 A We did receive an order from Birds Eye. I didn't recall

1 when that was. But, yes, we did pick up some additional
2 business from Birds Eye.

3 Q Now, Unilever occupied most of the Bellingham facilities,
4 isn't that true?

5 A Actually, I thought it was all of the Bellingham
6 facilities.

7 Q All right. Fair enough. And the South Dakota plant,
8 which was the other plant, in the beginning of 2008 was
9 underutilized, isn't that true?

10 A Severely underutilized. The plant was built to handle
11 primarily General Mills at the time, I believe, which was a
12 prior account of Patrick Calliari. But he lost that
13 business.

14 Q And, by the way, when you bought the company, you knew the
15 status of General Mills, is that correct?

16 A Yes.

17 Q Okay. And returning to my question, what happened in 2008
18 was that the South Dakota plant filled up with business,
19 isn't that also true?

20 A It filled up partially with business. I don't know that I
21 can say it filled up all the way with business because we had
22 some severe maintenance problems with the freezing piece of
23 equipment, that freezes the sauce. That didn't allow us to
24 produce as much as we would like.

25 Q Isn't it true, sir, that by the October time period of

1 2008, the Bellingham facility was running 20 hours a day,
2 which is full capacity, and the South Dakota facility was
3 running 20 hours a day, which was also full capacity? That's
4 a fact, isn't it?

5 A I can't recall the exact facts relative to tonnage through
6 the plant. But it could very well have been at those levels
7 at that time.

8 Q And it takes some number of months with customers like
9 Birds Eye to get them on line, isn't that true?

10 A It can take more than a year to bring them on line. We
11 talk to them about the concept. They look at it. They like
12 it. And then they have to go through all of the issues to
13 determine whether they're going to come out with that
14 product, introduce it to the market. We can be dealing with
15 the research people. And they may like the product, and then
16 at the last minute the marketing people are, quite honestly,
17 often the CEO will say, no, we're not going to do that
18 project, and the whole thing falls through the cracks.

19 Q And the lead time for the development of these customers,
20 what that means is that customers like Birds Eye that came
21 on line in 2008 were under development during the time that
22 Mr. Calliari was still with the company, isn't that true?

23 A Certainly communications were begun with them while he was
24 still employed by the company, yes.

25 Q Right. So the companies that ultimately consumed all the

1 capacity of the South Dakota plant were all companies that
2 were being developed as customers by Portionables while
3 Mr. Calliari was still there, right?

4 A Yeah.

5 Q And it's a fact, isn't it, that by the last quarter of
6 2008, the South Dakota plant was so busy you were turning
7 away business? Isn't that also true?

8 A We were turning away business because the capacity of the
9 plant wasn't at the levels that we had been told it would be
10 prior to the acquisition.

11 Q Sir, focusing specifically on my question, you couldn't
12 put any more business through the South Dakota plant; you
13 were turning business away?

14 A Uh-huh.

15 Q It was full. That's my point, and it was true?

16 A It was full, regardless of the reason.

17 Q The plant was operating at full capacity, isn't that
18 correct?

19 A Uh-huh.

20 Q Let me talk to you a little bit now about the history of
21 the negotiations, getting to the stock purchase agreement and
22 the employment agreement. First, I understand that you have
23 a son that's also in the business?

24 A Yes.

25 Q And what's his name?

1 A He's Louis P. Gentine, II, known as Louie. But we can
2 call him Louie.

3 Q Okay. And your son operates one of the divisions for you,
4 is that correct?

5 A He did. Up until this month he operated the -- he led the
6 consumer products division.

7 Q Okay. Now, your son had nothing whatsoever to do with the
8 transaction with Mr. Calliari, isn't that true?

9 A Actually, no. He didn't have a major role, but he did
10 attend the meeting that was talked about up at the Northwest
11 World Club offices, or whatever you call them, in
12 Minneapolis. I think he came along as a learning
13 opportunity. And he certainly was involved in internal
14 discussions relative to that also as a learning opportunity.
15 So he is certainly aware of things.

16 Q Okay. But as far as the considerations of your
17 negotiations with Mr. Calliari and Portionables, your son
18 wasn't going to be running the Portionables business or
19 involved with it after the acquisition, correct?

20 A No. Yes, yes, that's correct.

21 Q Okay. And he wasn't involved in any way in selling any
22 part of that business. He really had nothing to do with it,
23 isn't that correct?

24 A He wasn't involved in selling?

25 Q Selling. He had no part to do with Portionables before

1 the acquisition, correct?

2 A Okay. Did you mean did he have anything to do with buying
3 the business or selling product for the business?

4 Q My question was confusing. Let me withdraw it.

5 My point is simply that the only involvement that your son
6 Louie had with the Portionables acquisition was as a learning
7 experience, isn't that correct?

8 A Yeah.

9 Q Okay. And the deal you made with Mr. Calliari and the
10 Portionables shareholders was a deal struck after extensive
11 negotiation over the specific terms of that deal, isn't that
12 also true?

13 A Yes. There was back and forth about different issues
14 during that process of negotiation leading up to the
15 acquisition date.

16 Q And in those negotiations, it's fair to say, isn't it,
17 that at no time did you ever say to anyone, you know, my son
18 has control of one of these divisions, and the way he does
19 that is the way we're going to do this deal, correct? That
20 had nothing to do with the negotiations?

21 A I guess I didn't mention my son, but he did take -- in the
22 negotiations, we did set the parameters of Patrick's position
23 as that of a division president, which would be similar to my
24 son and at that time two other division presidents that we
25 had.

1 Q And I'm going to come to that, sir. But my question is a
2 very simple one again for you. You never mentioned your son
3 in these negotiations as some measure or example of what
4 operational control meant or did not mean?

5 A I can't say I didn't, because I'm sure that in talking to
6 Patrick I probably mentioned who were the current division
7 presidents at the time, and I certainly could have mentioned
8 my son.

9 Q But you never said anything like, you know, Mr. Calliari,
10 I'm never going to give you more control over something than
11 I've given my own son? You never said anything like that to
12 Mr. Calliari, did you?

13 A Probably not directly. But I would have told him that he
14 didn't have any more control than a division president.

15 Q Okay. Again, sir, we'll come back to that. But you never
16 used your son as some yardstick in this negotiation?

17 A I don't recall doing that, no.

18 Q Okay. Now, my understanding is that there were three
19 in-person meetings between you and Mr. Calliari to talk about
20 this deal. Is that consistent with your recollection?

21 A Well, is that prior to -- does that include the first time
22 we met? Which would have been, I believe, on a trip in
23 December or somewhere around that, late '06.

24 Q Let me do it this way. My understanding of the first
25 meeting that you had with Mr. Calliari, your first meeting

1 with him, was either in late 2006 or early 2007, isn't that
2 correct?

3 A That was our introductory meeting.

4 Q Okay. And you came over to the Portionables facility for
5 that meeting, correct?

6 A In Bellingham.

7 Q Right.

8 A Yes.

9 Q The second meeting occurred in Plymouth, Wisconsin, isn't
10 that also true?

11 A Yes, I believe it was.

12 Q And the third meeting occurred at this boardroom at the
13 Minneapolis airport, isn't that correct?

14 A Yes.

15 Q And the purpose of that third meeting was to iron out the
16 specifics of the transaction and to get the lawyers producing
17 final documents, isn't that true?

18 A Well, it was certainly to discuss the interests of both
19 parties. I don't know that the whole thing was ironed out at
20 that meeting. But certainly that's where we were trying to
21 gather this all in and start to reach a point of agreement.

22 Q But the sequence of events were these three meetings, and
23 then the lawyers did the dotting the I's and crossing the T's
24 pursuant to the instructions of both you and Mr. Calliari,
25 correct?

1 A I don't believe we had any other face-to-face meetings,
2 but I don't recall 100 percent. We may have also had, by the
3 way, some telephone calls or communications back and forth
4 and e-mails or other type of communication.

5 Q All right. And I was going to ask you that. In addition
6 to that, you recall talking to Mr. Calliari from time to time
7 on the phone about this deal?

8 A Oh, sure.

9 Q Okay. And your company is represented for business
10 matters by a Milwaukee firm that's called Reinhart Boerner,
11 isn't that correct?

12 A Yeah. It might have a few other names after it, like most
13 law firms, but Reinhart Boerner, yes.

14 Q And that's been your company's law firm for many years,
15 isn't that true?

16 A Yes.

17 Q That's one of the nation's 250 largest law firms. I read
18 that on the Internet this morning. Isn't that right, sir?

19 A Well, if you read it on the Internet, doesn't it have to
20 be correct?

21 Q I think it does.

22 THE COURT: I just told them I don't want them going
23 on the Internet.

24 MR. GOLDFARB: But you didn't tell me.

25 THE COURT: I didn't tell you, no. Go ahead,

1 Mr. Goldfarb.

2 BY MR. GOLDFARB:

3 Q Let me ask you to now look at the stock purchase
4 agreement, which is Exhibit 3, at Section 1.6.

5 A Yeah.

6 Q Do you have 1.6 before you, sir?

7 A In two places, yeah.

8 Q And 1.6(a) is the section that talks about the grant of
9 operational control in the stock purchase agreement, isn't
10 that right?

11 A Yeah, that is one place, I guess, it's discussed, yeah,
12 uh-huh.

13 Q That's the agreement that we're talking about right there,
14 correct, what I've circled?

15 A What you've circled is 1.6(a).

16 Q All right. And what Sargento agreed to in 1.6(a) was
17 that, prior to the contingent payment due date, the company
18 and sub -- do you see that?

19 A Uh-huh.

20 Q And when it says company and sub there, that's legalese
21 for Portionables, correct?

22 A Yeah, uh-huh.

23 Q Is that a yes?

24 A I believe that's why it said that, yeah.

25 Q Okay. First off, why is it that it's prior to the

1 contingent payment due date? What difference would that
2 make?

3 A Well, between the acquisition date and the contingent
4 payment due date, that would be the period of time where the
5 earnout was.

6 Q Right.

7 A There would be 12 months within that 20-month period of
8 time.

9 Q Okay. And the objective was that during that earnout
10 period, Mr. Calliari would have operational control over
11 Portionables, correct? That's what the idea was?

12 A Yes. But you can't read it alone, because you can't
13 ignore the other parts of the document that incorporate the
14 employment agreement as part of it. So this alone doesn't do
15 that by itself.

16 Q Trust me, sir, I'm going to get there.

17 A Good.

18 Q Okay. But I want to start with this agreement first.
19 This is the agreement that you made with the shareholders,
20 including Mr. Calliari, correct?

21 A If we look at it independently from everything else, the
22 answer would be yes. But, again, I would just say that one
23 can't do that.

24 Q All right. And we're going to look at the employment
25 agreement one step at a time, all right?

1 A Uh-huh.

2 Q So what you say here is, prior to the contingent payment
3 due date, Portionables will be operated in a manner
4 consistent with past practice. Do you see that?

5 A Yes.

6 Q And that's something that you negotiated specifically with
7 Mr. Calliari, isn't that correct?

8 A Yes.

9 Q And it also says here that the company will be operated
10 under the operational control of the shareholders'
11 representative. Do you see that?

12 A Yes.

13 Q And the shareholders' representative, everyone understood
14 that was going to be Mr. Calliari, isn't that correct?

15 A It was Mr. Calliari, yes.

16 Q Right. This says shareholders' representatives. But
17 everybody knew that he was the person who was going to be
18 appointed as the shareholders' representative under this
19 agreement, right?

20 A Yes.

21 Q Okay. And it also says here that the calculation of
22 EBITDA for purposes of determining the contingent payment
23 shall be appropriately adjusted for any deviations from this
24 general understanding to the extent of the impact the
25 understandings (sic). Do you see that?

1 A To the extent of the impact of such deviations, it says,
2 yeah.

3 Q All right. That meant that if there was an infringement
4 of operational control by Sargento, that the EBITDA would be
5 adjusted accordingly for any such deviation. Isn't that what
6 that means, sir?

7 A Yes, subject -- as it said right above it, subject to
8 specific agreements to the contrary contained in this section
9 and elsewhere in this agreement.

10 Q Okay. And, again, one thing at a time. We're going there
11 next, okay?

12 A Okay.

13 Q Now, what it says here, this section, what it's talking
14 about is Section 1.6, correct?

15 A Yeah, I assume that's 1.6, yes, uh-huh.

16 Q And what happened was, when you were in the boardroom at
17 Northwest Airlines in Minneapolis, you and Mr. Calliari had a
18 discussion about operational control, didn't you?

19 A You know, I don't recall the intimate discussions in the
20 boardroom. But I would guess that would have been an issue
21 that he was interested in.

22 Q And the tenor of the discussion was Mr. Calliari saying, I
23 want complete operational control, and you saying, I'm
24 concerned about the expenditure of certain funds or things
25 which might change the economics of the company. Do you

1 recall that?

2 A No.

3 Q All right. So let's look at Section 1.6(b), which is
4 called purchase or consent matters. Do you see that?

5 A Yeah.

6 Q Okay. And we'll talk about these in more detail in a
7 second. But what happened here is that Sargento and
8 Mr. Calliari agreed that there were certain specific things
9 that, if he wanted to do them, he had to ask you first,
10 correct?

11 A Yes.

12 Q And these were prepared by the lawyers. It's the whole
13 rest of this paragraph 1.6(b). And it covers six specific
14 situations, isn't that right?

15 A Yes.

16 Q Now, looking at the first one -- I'm now looking at where
17 the first item starts. Do you see that?

18 A Yes.

19 Q Okay. One of the things that Mr. Calliari had to ask your
20 permission to do was to enter into, terminate, or materially
21 amend any consent contract. Do you see that?

22 A Yes.

23 Q Okay. And consent contract is defined in another place in
24 this agreement. But if I recall correctly, it was any
25 contract over a certain amount of money, isn't that right?

1 A You would have to show me the agreement. I will assume
2 that that's right.

3 Q Okay. Now, focusing on Unilever for a second,
4 Mr. Calliari wanted to keep the Unilever contract as it was,
5 correct?

6 MR. SULKIN: Objection as to time, your Honor.

7 MR. GOLDFARB: Let me clarify, your Honor.

8 Q As of the point in time that you and Mr. Calliari had a
9 dispute about Unilever -- so I'm in the March-April time
10 frame of 2008 -- Mr. Calliari's position was: I do not want
11 to amend the Unilever contract, correct?

12 A Actually, Mr. Calliari said that he had been pressured by
13 a shareholder who was very uncomfortable with it, and as the
14 shareholder representative, he was conflicted as to how to go
15 forward with that. I don't recall that he specifically said
16 he didn't want to do it. Because we had a conversation, and
17 I asked him: What are you going to do?

18 Q Well, you actually received a letter from his counsel
19 representing him saying that Unilever was not to amend that
20 contract, isn't that correct?

21 A We did get a letter from his attorney. I thought you were
22 talking about direct conversation.

23 Q You got a letter from his attorney, so you knew that was
24 the position being advanced by Mr. Calliari and his counsel,
25 correct?

1 A Yeah.

2 Q We'll come back. We're going to talk about this in some
3 more detail, too. But for my purposes right now,
4 Mr. Calliari, as set forth in the letter, did not want to
5 amend the Unilever contract, correct?

6 A Yes.

7 Q Okay. You did want to amend the Unilever contract, isn't
8 that also true?

9 A Yes.

10 Q And that's what the difference of opinion was. He wanted
11 to keep the original contract as it was; you wanted to amend
12 the contract and change it, correct?

13 A Actually, my feeling was the contract had already been
14 amended by a letter sent by Mr. Calliari under his signature
15 to Unilever outlining a deal that he agreed with back in
16 August of 2007.

17 Q Mr. Gentine --

18 A And he never indicated at that time objection to that. He
19 never objected to that happening or suggested there was any
20 issue. Our company has a -- our company works maybe
21 differently than other big companies, since we've been
22 labeled a big company. And, you know, we consider a
23 handshake a handshake. Our word's our bond. And after that
24 letter went out, we were moving towards that agreement with
25 Unilever.

1 Q All right. And, sir, again, I will come to that also in
2 this examination.

3 A Okay.

4 Q What I really want to do is focus right now on paragraph
5 1.6(b) --

6 A Okay.

7 Q -- and understand exactly how the proposed Unilever
8 amendment fits within the things that Mr. Calliari has to
9 clear through you, okay?

10 A Okay.

11 Q Now, to be clear, your position was you wanted to change
12 the Unilever contract. His position was he did not, right?

13 A Yes.

14 Q Okay. Now, looking at 1.6(b)(i), one of the things
15 Mr. Calliari has to do is get your consent if he wants to
16 enter into, terminate, or materially amend any consent
17 contract. Do you see that?

18 A Yes.

19 Q Okay. But Mr. Calliari didn't want to do any of those
20 things here, did he?

21 A Not at that time. He had changed his mind.

22 Q Sir, he didn't want to do any of those things; therefore,
23 he didn't need to ask you for permission to terminate, amend,
24 or enter into a contract, because that's not what he wanted
25 to do. He wanted to keep the existing contract, right?

1 A Yes, other than the fact that this doesn't suggest that I
2 want to have the opportunity to do those things. This didn't
3 restrict me from those type of activities.

4 Q Sir, again, one thing at a time.

5 A Okay.

6 Q We'll get there. I care what the written words are that
7 your lawyers prepared in this section that talks about when
8 he does or does not have to take his operational control and
9 ask you first.

10 A Okay.

11 Q And all I want to clarify right now is that amending the
12 Unilever contract was your idea of what you wanted to do. He
13 was opposed to it. But this section here that talks about
14 entering into, terminating, or materially amending a contract
15 doesn't apply because Mr. Calliari didn't want to do any of
16 those things, right?

17 A I don't want to be picky, but you said it was my idea.

18 Q Let me rephrase.

19 A And it was our idea initially. But relative to that, he
20 did not want to do it at that time, yes.

21 Q Okay. So just, again, we'll do this as carefully as we
22 need to.

23 A Okay.

24 Q But 1.6(b)(i) doesn't apply here, right?

25 A From that perspective, yes, right.

1 Q Okay. And 1.6(b)(ii) has to do with selling capital
2 assets in excess of \$100,000. That didn't apply here either,
3 did it?

4 A Are you saying relative to Unilever?

5 Q Yes. Thank you.

6 A No, that didn't apply either.

7 Q Okay. And 1.6(b)(iii), entering into an agreement with
8 any related person, that didn't apply to Unilever?

9 A No, that didn't apply.

10 Q Okay. And (b)(iv), entering into a loan or a guarantee,
11 that didn't apply, correct, to Unilever?

12 A No.

13 Q Okay. And 1.6(b)(v), selling or transferring any equity
14 or profit interest in the company, that didn't apply to the
15 Unilever amendment, did it?

16 A No.

17 Q And the same for (vi), such other matters as may be agreed
18 in writing by the purchaser and shareholders' representative?
19 And there was no agreement in writing between Mr. Calliari
20 and Sargento relative to changing paragraph 1.6(b), correct?

21 A I don't know that that's exactly correct, because I think
22 the letter sent by Mr. Calliari in August of 2007 would have
23 been something in writing.

24 Q But what this says, sir, is it has to be a matter agreed
25 to in writing by the purchaser and the shareholders'

1 representative. And there was never any agreement or
2 amendment to Section 1.6 that had to do with Unilever; that's
3 true, isn't it?

4 A Are you saying that this would suggest -- this would have
5 been a change, that we agreed to change 1.6(b), or was it
6 another -- I'm confused on what you're saying.

7 Q Let me rephrase my question.

8 A Okay.

9 Q There was never a letter from Mr. Calliari or a written
10 agreement between him and you that said that whether or not
11 the Unilever amendment would be modified was something that
12 fell within this paragraph?

13 A Again, I can't say that for sure, because I would think
14 the letter he sent, which we both approved of, was in effect
15 that type of a document. But it may not apply. I'm just not
16 certain that it doesn't.

17 Q Okay. But there was no agreement that was entered into
18 between you and Mr. Calliari where you said now modification
19 to the Unilever contract is something that needs to go
20 through paragraph 1.6 and it's subject to your direction,
21 correct?

22 A Well, again, I'm saying that the letter that he sent on
23 August 16th is a manifestation of the fact that we had
24 agreed, a manifestation in writing that we had agreed to make
25 changes to the contract.

1 Q Okay. And, again, sir, that's not what I'm asking. This
2 is a consent paragraph. And there are six different things
3 that are called out here for consent. What I want to do know
4 is if there is any written document where Mr. Calliari agreed
5 that you had the right to consent or order him what to do
6 with regard to the Unilever amendment?

7 A Okay. If that's what that means, yes.

8 Q Yes, there is such an agreement?

9 A No. I'm saying that, yes, there wasn't such an agreement.

10 Q Okay. Now, in the stock purchase agreement, did the
11 shareholders and Sargento agree on certain things that might
12 happen if Mr. Calliari left Portionables during the earnout
13 period?

14 A You know, I believe that there were such instances in both
15 the stock purchase agreement and the employment agreement,
16 and they had to be looked at in combination with each other.

17 Q Sir, let me show you page 5 of the stock purchase
18 agreement.

19 A Uh-huh.

20 Q This is the fundamental changes section that appears, I
21 believe, at Section 1.6(d) of the agreement, correct?

22 A Uh-huh.

23 Q Okay. And you see there the part that I've highlighted?

24 A On that whole upper section, yeah, uh-huh.

25 Q That talks about what happens if, prior to the contingent

1 payment due date, Mr. Calliari resigns for good reason. Do
2 you see that?

3 A Well, actually, I'm not certain that it isn't an
4 exception, without clause or by the shareholders'
5 representative for good reason --

6 Q Well, what it says is that if, prior to the contingent
7 payment due date, the employment of the shareholders'
8 representative as the executive of the purchaser or the
9 president of the sub is terminated directly or indirectly by
10 the purchaser, that's Sargento, without cause or by the
11 shareholders' representative for good reason. Do you see
12 that?

13 A Either of those cases, yeah.

14 Q Right. And you know there's a claim in this case that
15 Mr. Calliari resigned for good reason, correct?

16 A Yes.

17 Q Okay. And what I want to do is make sure that you
18 understand and we're communicating about what happens in that
19 event. And what the parties agreed was that that would be a
20 fundamental change to the stock purchase agreement, isn't
21 that correct? That's why that heading is called fundamental
22 change?

23 A The heading says fundamental change. And where? Do you
24 want me to read down farther?

25 Q No. The question really is just this: That the

1 resignation of Mr. Calliari for good reason during the
2 earnout period was such a significant event that the parties
3 agreed to call it a fundamental change of the agreement. Do
4 you see that?

5 A Right. The heading of that section is fundamental change,
6 yeah.

7 Q Right. And that's because if Mr. Calliari resigned for
8 good reason, he wouldn't be running the company anymore,
9 correct?

10 A Uh-huh.

11 Q Okay. And what you agreed to in that situation is what
12 I've highlighted in the middle of the section?

13 A Okay.

14 Q Okay. Which is if that happened, that there would be a
15 rebuttable presumption that would arise that the entire
16 contingent payment would be owed, isn't that correct?

17 A That's not my understanding of a rebuttable presumption.
18 My understanding of that is that it would still go to
19 arbitration, and we would have to prove that, regardless of
20 the fact that that happened, that the contingent -- the
21 calculation that we looked at before would have or would not
22 have reached some level or another.

23 Q Okay. And I appreciate that.

24 A So that's my understanding of it, so.

25 Q Right. So --

1 A So it wouldn't mean that necessarily the entire amount
2 would have to be paid.

3 Q Okay. But what it meant was that in the arbitration it
4 would be Sargento's responsibility or burden to prove --

5 A Yes.

6 Q -- that a higher amount wasn't owed, is that correct?

7 A Yeah, it would be our burden of proof to show that, yeah.

8 Q And that was built in as protection requested by the
9 shareholders when they negotiated this agreement, correct?

10 A I would guess so, yes.

11 Q Okay. Because that doesn't help Sargento. This is a
12 provision that benefits the shareholders, correct?

13 A It would appear to, yes.

14 Q And the purpose of this provision is to address what
15 happens if for good reason Mr. Calliari leaves Sargento's
16 employment -- I'm sorry -- Portionables' employment?

17 A Actually, I believe he was employed by Sargento.

18 Q But he was the president of Portionables, correct?

19 A Uh-huh.

20 Q Okay. And the purpose of this is to protect the
21 shareholders if he doesn't have operational control for the
22 whole earnout period because he's gone. That's why this is
23 there?

24 A Yeah, yes, uh-huh. I don't know for the whole earnout
25 period, but it was if he didn't have -- operational control,

1 of course, was their issue.

2 Q Let me ask you to look next at the employment agreement,
3 which is Exhibit 2.

4 MR. GOLDFARB: Your Honor, I'm not sure this has been
5 formally moved for admission at this point in time.

6 MR. SULKIN: No objection.

7 THE COURT: 2 is admitted.

8 (Exhibit(s) 2 admitted.)

9 BY MR. GOLDFARB:

10 Q Mr. Gentine, before we get into the details of this
11 agreement, let me see if I can capture what your position is
12 about how this works. Your view is that, regardless of --
13 well, your view is that you had a right at all times during
14 the employment of Mr. Calliari as the president of
15 Portionables to trump his decisions if you so chose, correct?

16 A Well, he was serving as a division -- a division
17 president. And somebody that is subordinate to me, I would
18 have the ability to override a decision that he wanted to
19 make. And I've done that many times.

20 Q So your interpretation of the employment agreement and the
21 stock purchase agreement, your personal interpretation, was
22 that those documents gave you a right to overrule
23 Mr. Calliari, as you've just said, correct?

24 A Yes, in combination with each other.

25 Q All right. So let's look first at the employment

1 agreement. And if you could look at paragraph 2, which is
2 the term. Do you see there, sir, that the term of the
3 agreement was through December 31, 2012?

4 A Yes.

5 Q So it was a five-year agreement, is that right?

6 A Yeah. Actually, more than five years, because it was from
7 April 30th of 2007. So it was probably an extra eight
8 months, 68 months maybe.

9 Q And then unless the parties gave notice to each other, it
10 actually would automatically renew from there. So it could
11 even be longer than five years, right?

12 A Yeah.

13 Q Okay. The next section of the agreement addresses duties,
14 isn't that right?

15 A Following the term, yes, duties.

16 Q Section 3. Okay. So we'll look at this page first, and
17 then we'll look at the next page.

18 A Good.

19 Q All right. Now, this duty section draws a distinction for
20 two periods of time, doesn't it? There's a time before the
21 contingent payment due date, and there is a time after the
22 contingent payment due date, correct?

23 A There is reference in some of the phrases here to before
24 and after, yes.

25 Q And the reason that there's a distinction between the

1 before the contingent payment due date and after the
2 contingent payment due date is that Mr. Calliari's rights
3 under this agreement were different during those two times,
4 isn't that so?

5 A Well, to some degree, yes, yeah, because we had the
6 earnout period during part of it.

7 Q Right. And just to be clear, Mr. Calliari's rights under
8 the employment agreement were different during the earnout
9 period than they were afterwards, isn't that so?

10 A Well, actually, they could be. I think the comment is --
11 I don't think it's on this first page, where he said that the
12 performance duties as assigned by the president, chief
13 executive officer, meaning me. But on the second page --
14 maybe you're going to get to it, but throughout the
15 employment agreement, executive shall have duties and
16 responsibilities and obligations that are not inconsistent
17 with that of a division president or executive officer of the
18 corporation, except where his position prior to the
19 contingent payment date as Portionables president might
20 result in greater duties and responsibilities.

21 Q Okay. And I want to --

22 A So if that's what you're talking about, that, I guess,
23 would to be differentiation. But it's only a might, not a
24 will.

25 Q All right. And that makes a difference, doesn't it, might

1 **versus will?**

2 **A I think so.**

3 **Q Okay. Will means shall, doesn't it?**

4 **A Does will mean shall?**

5 **Q Yes.**

6 **A I'm not a grammatician, but.**

7 **Q But might and will, might and shall, those are different,**
8 **aren't they?**

9 **A Yeah.**

10 **Q Okay. So let's look at the bottom of the first page as it**
11 **carries over to the second page. So the first highlighted**
12 **sentence there, where it starts with "after," do you see**
13 **that?**

14 **A Uh-huh.**

15 **Q Okay. After the contingent payment due date, which is**
16 **after December 31, 2008, you can change Mr. Calliari's**
17 **reporting obligation, isn't that correct?**

18 **A Yes.**

19 **Q And that's what you and he agreed to, right?**

20 **A Yes.**

21 **Q Okay. Then what's highlighted in blue here talks about**
22 **what happens until the contingent payment due date, isn't**
23 **that so?**

24 **A Yes.**

25 **Q And it says there that until the contingent payment due**

1 date under the purchase agreement, executive, that's
2 Mr. Calliari, right?

3 A Yes.

4 Q Shall serve as president of Portionables and shall have
5 operational control of the Portionables business subject to
6 the limitations in the purchase agreement, isn't that
7 correct?

8 A Yes. But the limitations in the purchase agreement, which
9 recycle back to this agreement, relative to what his role was
10 here. So, yes, it would, in that light.

11 Q Now, we just looked at Section 1.6(b) of the purchase
12 agreement, which were those six items. Do you recall that?

13 A Yes.

14 Q Yes. And those six specifically negotiated items in the
15 purchase agreement don't apply here, do they?

16 A Yes. But this wasn't -- this isn't written to be only
17 those six limitations. It's talking about limitations in the
18 purchase agreement. So those six limitations, we went
19 through those, and I think we determined, yes, they don't
20 apply here. But that isn't the total limitations in the
21 purchase agreement.

22 Q Okay. We'll come to that, too.

23 A Okay.

24 Q Those six that are specifically negotiated that go right
25 after the operational control provision in the purchase

1 agreement, those don't apply, right?

2 A I think that's what we said, yes, uh-huh.

3 Q Okay. Then the next sentence is the one that you read to
4 me, right?

5 A Uh-huh.

6 Q And that applied for the whole term, five and a half
7 years, of the employment agreement, correct?

8 A Uh-huh.

9 Q Okay.

10 A Yes.

11 Q But, in addition, it's enhanced for the period during the
12 contingent payment due date?

13 A It's potentially enhanced, that it might result in greater
14 duties and responsibilities.

15 Q Okay. You'd agree that Portionables was going to be
16 operated in a manner as it had before? We went over that
17 language earlier today. Do you recall that? It's in the
18 stock purchase agreement. It said: Mr. Calliari shall have
19 operational control of the company and it will be operated in
20 a manner consistent with the way it had been before. Do you
21 recall that?

22 A That is definitely part of that agreement. But, again,
23 you can't look at that independently without looking at his
24 exact role that's defined in the employment agreement as that
25 of a division president. So I think what ends up happening

1 is you would expect that, because of the two agreements being
2 together, that how he operated in the past would be similar
3 to that of a division president, with similar
4 responsibilities, obligation, and duties.

5 Q In the past, there had been an original Unilever contract
6 signed in 2004, correct?

7 A Yes.

8 Q And Mr. Calliari negotiated all of the terms of that
9 agreement, did he not?

10 A I can only say we weren't involved. But I don't know if
11 others were involved with Mr. Calliari.

12 Q You have no reason to believe that Mr. Calliari didn't
13 negotiate that agreement on behalf of Portionables, do you?

14 A I have no reason to believe that he wasn't intimately
15 involved. And I don't know if he was the sole negotiator.

16 Q And he signed that agreement on behalf of Portionables?

17 A He absolutely did.

18 Q And so the past practice was that any contract with
19 Unilever would be signed by Mr. Calliari, isn't that true,
20 because that's what had happened in 2004?

21 A I'm confused on that question.

22 Q I'll restate it. I'm sorry. The question is: It's true,
23 isn't it, that the past practice with regard to Unilever was
24 that Mr. Calliari signed the contractual documents, and
25 that's exactly what happened in 2004?

1 A Yes, he definitely did sign it in 2004.

2 Q Sir, if you would now turn to page 7 of Exhibit 2. Under
3 the employment agreement, you had a right to terminate
4 Mr. Calliari for cause, correct?

5 A Yes.

6 Q And this definition for cause tells you the different ways
7 that you can do it, correct?

8 A Yes.

9 Q And the last one here is the material failure to perform
10 the duties set forth in the employment agreement to the
11 reasonable satisfaction of the president, chief executive
12 officer. That's you, correct?

13 A Yes.

14 Q Okay. Which failure continues for a period of 30 days
15 after receipt of notice from Sargento specifying the details
16 of such alleged failure. Do you see that?

17 A Yes.

18 Q And no notice was ever provided to Mr. Calliari under this
19 section, correct?

20 A Well, I don't know if no notice was provided. We
21 obviously had discussions relative to his performance levels.
22 And I think there was a letter where his performance was
23 related to sometime in March or April.

24 MR. GOLDFARB: Your Honor, may I approach?

25 THE COURT: You may.

1 MR. GOLDFARB: Your Honor, I would like to request to
2 open and publish Mr. Gentine's deposition.

3 THE COURT: All right.

4 MR. GOLDFARB: May I proceed, your Honor?

5 THE COURT: Go ahead.

6 MR. GOLDFARB: Thank you.

7 Q Mr. Gentine, you gave a deposition in this case under oath
8 on the 24th of August of this year, is that correct?

9 A Yes.

10 Q And you promised at that time to answer questions
11 truthfully, did you not?

12 A To the best of my ability.

13 Q And, sir, directing your attention to page 36 of your
14 deposition, beginning at line 2.

15 A Uh-huh.

16 Q Sir, was this --

17 A Line 2?

18 Q Page 36, line 2 to line 10. Sir, was this your testimony
19 at your deposition? Question: Okay. And so no such notice
20 was ever provided to Mr. Calliari, isn't that true? Answer:
21 Notice that he would be terminated if he didn't? Question:
22 If he didn't cure certain conduct within 30 days, he would be
23 terminated for cause? No such notice. Some letters were
24 written, but no notice was ever given under the employment
25 agreement, no 30-day notice? Answer: No, I don't believe

1 there was a notice given.

2 And that was your testimony, correct?

3 A Yes.

4 Q Now, under the employment agreement, Mr. Calliari also had
5 the right to terminate for good reason under certain
6 circumstances, isn't that correct?

7 A Yes.

8 Q And that provision is on page 8 of the employment
9 agreement at small i. Do you see that? Good reason?

10 A Small ii.

11 Q I'm sorry. You are correct. Small double i. And it
12 indicates there that termination for good reason shall mean a
13 termination of executive's employment by executive following
14 a material breach by the corporation of any provision of this
15 agreement which failure continues for a period of 30 days
16 after the corporation's received written notice.

17 Do you see that?

18 A Yes, I do.

19 Q Okay. And such a notice was received by Sargento on May
20 23rd of this year -- or I'm sorry -- 2008, correct?

21 A Yes.

22 Q Okay. And when it says, following a material breach of
23 any provisions of this agreement, you would agree with me
24 that the operational control provisions are provisions of the
25 employment agreement?

1 A Operational control was both mentioned in the employment
2 agreement and the stock purchase agreement.

3 Q But there is a specific provision of operational control
4 --

5 A Uh-huh, I think we looked at it already.

6 Q But you agree that this paragraph of good reason, where it
7 talks about a breach of any provision of this agreement,
8 would include the operational control provisions?

9 A Uh-huh, yes.

10 Q Now, in addition to your contractual right to terminate
11 Mr. Calliari for cause if you gave him notice, you also had a
12 contractual right to terminate the employment agreement on
13 the spot, didn't you?

14 A Would that be the termination without cause?

15 Q Yes, sir.

16 A Yeah, there was an opportunity to do that as well, yeah,
17 uh-huh.

18 Q That's this provision that I've just circled, is that
19 correct?

20 A No. I think that's the termination for cause.

21 Q You're completely correct. I apologize.

22 This is the termination without cause provision, correct?

23 A Yes.

24 Q And am I also correct in understanding that at no time did
25 you exercise this termination without cause provision?

1 A No, we did not exercise that provision.

2 Q But if you were dissatisfied with Mr. Calliari's
3 performance and you wanted to sign the Unilever contract and
4 just put an end to the disagreement, one thing, one choice
5 you had was simply to terminate him without cause. You could
6 have done it in 24 hours, right?

7 A I certainly would have, I guess, had the ability to
8 terminate him at any time without cause.

9 Q But under this provision, there are consequences to doing
10 that, aren't there?

11 A Yeah, I believe they are listed there.

12 Q Right. And the consequences are that if you do that, you
13 have to continue to pay him both his base salary and his
14 benefits throughout the term of the remaining agreement,
15 isn't that correct?

16 A If we terminated him without cause, yes.

17 Q And this whole time in April, May, June of 2008, when this
18 dispute ripened between you and Mr. Calliari, you were being
19 represented by your law firm, isn't that correct?

20 A Yes.

21 Q Sir, let's talk next a little bit about Unilever. First,
22 when Sargento acquired Portionables, you were aware of the
23 existing Unilever contract, isn't that correct?

24 A Yes.

25 Q And you also were aware at that time that the Unilever

1 contract contained certain exclusivity provisions, were you
2 not?

3 A Yes.

4 Q And what those meant were that if Unilever stopped buying
5 product from Portionables, it couldn't buy it from anyone
6 else in the United States, isn't that correct?

7 A Prior to the acquisition, I believe it was correct. I
8 also think that once the company was acquired, those
9 exclusivity provisions disappeared.

10 Q As a practical matter, Sargento made -- I'm sorry --
11 Unilever made similar products to what were being made in
12 Bellingham in Italy, isn't that correct?

13 A Yes.

14 Q Okay. And it shipped some, but not all, of its U.S. need
15 from that Italian plant, isn't that correct?

16 A You are saying prior to Portionables' existence?

17 Q Let me rephrase.

18 A Yeah, because obviously some needs were coming from
19 Portionables, correct.

20 Q It is true, is it not, that Unilever had invested over 10
21 million dollars in the Portionables' plant in Bellingham?
22 That's true, isn't it?

23 A That's what we were told, yes.

24 Q And you also knew that Unilever was a key customer of
25 Portionables, isn't that correct?

1 A Absolutely.

2 Q And, in fact, in the stock purchase agreement, Exhibit 2,
3 there's a list of key customers, is there not?

4 A I would have to look at it, but I assume you're going to
5 bring that up. The stock purchase agreement is Exhibit 3,
6 isn't it?

7 Q Yes, sir, you are correct.

8 A It's amazing how often that happens.

9 Q So, sir, attached to the stock purchase agreement were a
10 variety of schedules. This is one that was called key
11 customers. Do you see that?

12 A Yes.

13 Q And Unilever was listed as number 1, isn't that right?

14 A Yes.

15 Q And what that means, amongst other things, is that
16 Unilever was key to the shareholders making their earnout,
17 correct?

18 A I don't know all the reasons for that being in there.
19 They were listed number 1. I'm not aware that that was
20 listed in an orderly fashion. But they were the largest
21 customer when we acquired the company. And I don't think
22 that all the people that were actually on that exhibit were
23 customers, as it turned out.

24 Q And my point in showing that to you was that, if Unilever
25 wasn't the most important of Portionables' customers, it was

1 right up at the top of the list, correct?

2 A Yes.

3 Q And so reductions in the amount of profits that would come
4 from the Unilever agreement would potentially impact EBITDA,
5 correct?

6 A Yes, as would the elimination of the business if they
7 chose to go elsewhere.

8 Q The original Unilever contract, the one signed by
9 Mr. Calliari in 2004, had some price points, didn't it? The
10 first amount of quantity was at 38 and a half cents per
11 pound, and then it dropped down. And then everything over 20
12 million pounds, I believe, was at 37 cents per pound? Is
13 that your recollection?

14 A I'm not certain about the over 20 pounds, but I know it
15 got to 37 cents. And that might have happened at over 10,
16 but I don't recall exactly.

17 Q The amendment proposed to change the pricing on anything
18 that was sold to Bellingham over 20 million pounds, correct?

19 A Huh?

20 Q The proposed amendment would reduce the price to Unilever
21 for any product sold over 20 million pounds?

22 A Yes, it did.

23 Q And from what to what?

24 A It would drop it from 37 cents down to 23 cents.

25 Q So it's approximately a 14 cent difference, is that

1 correct?

2 A Yeah, I guess it would be approximately a 14 cent
3 difference.

4 Q And what happened in this case was that in calendar year
5 2008, Unilever ended up doing about 29 million pounds,
6 correct?

7 A Yes, uh-huh.

8 Q So there was about 9 million pounds that the pricing would
9 be different under the original contract versus the
10 amendment, isn't that correct?

11 A Assuming they would have purchased the same amount of
12 product if we hadn't signed the amendment, you could look at
13 it that way.

14 Q Right. And that difference between the old contract and
15 the new contract, looking at it based on the number of pounds
16 that Unilever actually did, affected EBITDA by about 1.3
17 million dollars, approximately, isn't that true?

18 A If you would look at the information in a vacuum as you
19 are presenting it, there would be 1 point -- whatever that
20 number the math would turn out to.

21 Q The math is about 1.3 million dollars' worth of
22 difference, isn't it?

23 A Yes, but you can't look at it as you're presenting it.
24 But as you're presenting it, the math is approximately 1.3
25 million dollars.

1 Q Right. And so if the shareholders were at the EBITDA
2 threshold of 3 million dollars and you added another 1.3
3 million, so it became 4.3 million, under the EBITDA formula
4 in the stock purchase agreement, approximately how much money
5 would be owed to the shareholders?

6 A Well, we'd take that 1.3 times six. If that 1.3 drove
7 them 1.3 above the 3 million -- the actual performance was
8 well under that. But if it drove it from 3 million to 4.3
9 million, it would be 1.3 times six, 7.8 million dollars.

10 Q Right. And then you would add another million dollars to
11 that?

12 A Well, yeah, but you're assuming that it was already at 3
13 million as you presented it. They would have earned that
14 when it hit 3 million.

15 Q Okay. Fair enough. So it's a 7.8 million dollar swing
16 based on the pricing differential between the old Unilever
17 contract and the new Unilever contract on 20 million pounds,
18 correct?

19 MR. SULKIN: Objection, your Honor. Misstates the
20 testimony about EBITDA.

21 THE COURT: Overruled. I'm assuming that this is a
22 hypothetical.

23 MR. SULKIN: Thank you, your Honor.

24 MR. GOLDFARB: Yes, your Honor.

25 THE COURT: Go ahead.

1 A You want to phrase that again? I think we agreed that it
2 would be 7.8 million dollars, yeah.

3 BY MR. GOLDFARB:

4 Q Now, between the discussions with Unilever that happened
5 in the fall of 2007 and the spring of 2008, was there a
6 period of time when Unilever did not respond?

7 A Depends what you mean by respond. First of all, the
8 discussions with Unilever started in May or June of 2007,
9 almost immediately after when Unilever came to Portionables
10 and said they wanted a reduction in price.

11 But so, you know, on August 16, after a different
12 response, after Patrick offered them 4 cents a pound less
13 than the current price, which would take -- he was going to
14 offer them all the product at 35 cents a pound. So that's
15 where that 1.3 isn't a rational number. But after he did
16 that, we all sat down together and mutually agreed to a
17 proposal, an agreement, with Unilever to do the 38 and a half
18 cent/23 cent deal.

19 Q I guess my question wasn't clear.

20 A No.

21 Q My question was: Wasn't there a gap in the discussions
22 with Unilever that started in approximately August of 2007
23 and continued until January of 2008 when Unilever did not
24 respond to any proposal? That's a fact, isn't it?

25 A Well, actually, I wouldn't say that. That's not how I

1 would read it, Mr. Goldfarb, because during that period of
2 time, Unilever was making visits to our facility to see how
3 they could increase the production to take advantage of that
4 new agreement. They had engineers out there. They had
5 probably marketing people, purchasing people. They were
6 working with our plant production people to see how they
7 could generate more volume. So there was activity going on
8 relative to that offer that we had made, the deal that we had
9 made, during that period of time.

10 Q Let me try one more time.

11 A Okay.

12 Q As far as proposals were made for contract amendments,
13 there was a big gap in time between August or September of
14 2008 -- I'm sorry -- 2007 and January of 2008 before Unilever
15 ever responded to the letter that Mr. Calliari sent, correct?

16 A Yeah, you could say that there was -- they didn't respond
17 to it, but they were doing their homework.

18 Q Okay. But as far as putting some counterproposal on the
19 table, that didn't happen for about four months, isn't that
20 right?

21 A Following the homework that they did, yeah. They came
22 back with something, but they had to review the whole thing.
23 We totally understood. That's how these companies work.

24 Q Again, sir, there was a gap between the time Mr. Calliari
25 sent his initial letter, right?

1 A Well, between that and, yes, there was a period of time,
2 reasonable on my part, from my point of view. But, yeah,
3 there was a period of time before they --

4 Q That's all I'm asking. There was a period of time of
5 about four months between the letter and the response,
6 correct?

7 A Yes.

8 Q Okay. And when Unilever responded, they didn't say, we
9 accept, did they?

10 A When they responded, they said they wanted to make some
11 slight tweaks to the agreement, none of which impacted the
12 earnings during the earnout period.

13 Q Well, one thing they wanted to do was shorten the term
14 from five years to three years, 40 percent, right?

15 A They wanted to. And that was not what the final agreement
16 ended up to. But three years wouldn't make any difference
17 because the earnout agreement would have been completed at
18 the end of 2008, and that was less than three years.

19 Q But Mr. Calliari at this point in time, spring of 2008,
20 still worked for Portionables, correct?

21 A Yes, he did.

22 Q And he had incentive provisions at Portionables in his
23 employment agreement, too, didn't he?

24 A Yes, he did.

25 Q Okay. So he might view that Unilever amendment in a

1 particular way in light of his incentive provisions, correct?
2 A Well, if you looked at just the pricing portion of the
3 amendment. But along with it we, number one, had a risk that
4 Unilever was going to self-manufacture. We had been made --
5 they had told us that this was a possibility. And, by the
6 way, it ended up being a reality. They were preparing their
7 plant in Owensboro, Kentucky, to self-produce.

8 So, anyway, we had that risk sitting there when they said,
9 we can self-manufacture. There was not a -- there was not a
10 minimum that they could -- they had to buy from us, which was
11 included in the amended agreement, which in fact made the
12 amended agreement much stronger than what Patrick offered
13 them in early June or whenever he did, when he offered a
14 reduction in price from 39 to 35 or whatever those numbers
15 were.

16 Q Let me see if I can cover this quickly before the break.
17 The ultimate amendment with Unilever was not signed until
18 July of 2008, correct?

19 A I believe it was, yeah.

20 Q It was still under negotiation in April when Mr. Calliari
21 was there, correct?

22 A Somewhere in that period of time we locked in on what the
23 agreement was.

24 Q Okay.

25 A I don't know. It didn't take us until the end of June.

1 Q But the agreement was still under negotiation and was not
2 signed in April of 2008, that's true?

3 A I can't say it was under negotiation, but it wasn't signed
4 yet.

5 Q Okay. Were you in charge of those negotiations?

6 THE COURT: Mr. Goldfarb, we have to find a place to
7 stop.

8 MR. GOLDFARB: Now is as good as any, your Honor.

9 THE COURT: All right. Sir, you may step down.

10 Ladies and gentlemen, I'm going to send you to lunch. Did
11 anybody want to know what you were doing at the courthouse
12 yesterday when you got home? Yes? No? Some of you, yes.
13 All right. Well, I'm going to remind you again before I send
14 you to lunch to please remember that special position you
15 hold as jurors, not only to be fair, but to give the
16 appearance of fairness as well. And, remember, we don't talk
17 about the case until you deliberate.

18 And, finally, I don't care what Mr. Goldfarb does. If he
19 wants to use the Internet, that's his business. But I care
20 about what you do, which is no outside information, please.

21 Have a good lunch. We'll see you back at 1:25.

22 (Jury leaves courtroom.)

23 THE COURT: Okay. Let's talk a moment about this
24 deposition. I had a chance to read the designations over the
25 break. So I believe I understand why it is the defense does

1 not want it to be read at all. But let me hear from the
2 plaintiffs as to what issue this goes to.

3 MR. FISHER: Your Honor, from our perspective, and
4 this is in the -- you know, this issue is in the pretrial
5 order and is raised there because this is one of the things
6 we were going to be presenting. And, again, there was no
7 suggestion that there was a relevance issue with respect to
8 this deposition until last night. I think we got the e-mail
9 this morning on that.

10 But, your Honor, the point is this: Per the testimony, in
11 fact, the designated portions of the deposition testimony of
12 Karl Linck, he is an officer of Sargento. We asked him the
13 foundational question. His job duties include responsibility
14 over the plants, the licensing, and compliance issues.

15 And right up front in that deposition, I asked him: Did
16 you take over those responsibilities for the Portionables'
17 plant on May 1, 2007, after the sale? And he said: No, I
18 did not, because Patrick Calliari had full control over
19 Portionables.

20 That was his testimony. He's an officer of the company.
21 It is within his sphere of responsibility. It's specific to
22 the engineering issues. And that testimony is an admission
23 of a party opponent in this context.

24 We then went on. What we found out when he testified was
25 that Sargento identified an issue, which has been resolved

1 for purposes of their warranty claim under the SPA, that
2 Sargento believed that the plant in South Dakota might be out
3 of compliance with the legal requirements imposed by the
4 state of South Dakota.

5 And what happened was there began to be a series of
6 discussions among the management of Sargento about how to
7 respond to that and what the consequences of responding to
8 that would be. And there is testimony in there that this was
9 going to open a Pandora's box. The executive vice president
10 of Sargento said: We shouldn't touch this until January of
11 '09. They went ahead and did it anyway.

12 Mr. Calliari was essentially, in the main, excluded in all
13 discussions on how to handle that issue. At the end of this
14 testimony in his deposition, he said that in April and May of
15 2008 they were in an adversarial position. They were
16 building a case against the shareholders for a breach of the
17 warranty claim, and they were actually retaining consultants
18 for this purpose, and that there were e-mails that were going
19 from Mr. Linck on this issue. Mr. Calliari was still
20 allegedly running the company. There were issues about how
21 to deal with these regulatory issues, when to do it, how to
22 do it, and he was completely excluded from those discussions.

23 So, your Honor, from our perspective, the relevance and
24 admissibility of this testimony is testimony about his
25 understanding which wasn't from Mr. Calliari that

1 Mr. Calliari had full control of those two plants, his
2 testimony that he was instructed not to communicate directly
3 with Mr. Calliari, that everything was filtered through
4 Mr. Gordy, and the fact that he was not even asked or allowed
5 to participate in decision-making on what they described as
6 opening a Pandora's box during the earnout period.

7 We submit, your Honor, it's evidence that supports our
8 case. It's not going to take more than 15 minutes to read it
9 into the record. It's admissible under the evidence rule as
10 an admission of a party opponent. And he was designated at
11 one point as their most knowledgeable person on this
12 engineering area. And we would submit, your Honor, that the
13 testimony should come in.

14 MR. LINEHAN: Your Honor, may I briefly respond?

15 THE COURT: Yes, go ahead.

16 MR. LINEHAN: I disagree with a number of things
17 Mr. Fisher said. But I think the most important thing is
18 that this is a question of unfair prejudice to Sargento. We
19 asked in his deposition: Please, tell us everything that
20 constitutes your claim for interference of operational
21 control.

22 And I have the pages of his deposition where he walks
23 through those issues. No mention of South Dakota. And that
24 deposition took place a year and a half after South Dakota
25 arose.

1 It's also not in the notice letter that he provided on May
2 23 stating his good reasons for resigning.

3 THE COURT: Is it part of the pretrial statement?

4 MR. LINEHAN: They included that as one of their
5 contentions in the case, your Honor.

6 THE COURT: Okay.

7 MR. FISHER: And, your Honor, he didn't have any of
8 this --

9 THE COURT: Just a minute. Are you finished?

10 MR. LINEHAN: I am, your Honor.

11 THE COURT: Okay. Go ahead.

12 MR. FISHER: Your Honor, he didn't know about this
13 evidence at the time. He believed they had in fact hired
14 lawyers, who were the Reinhart lawyers, who were looking out
15 for Sargento's interests. Mr. Calliari didn't even have any
16 of this until discovery took place in this case. It's not
17 possible to include it in there because he didn't know the
18 machinations that were going on behind the scenes with
19 respect to this regulatory issue. So it can't be in the
20 letters.

21 But aside from that, the issue of control, if what these
22 folks are arguing is if it's a contract issue within the four
23 corners of the agreement, which was our argument, if the
24 issue is what's their understanding of the scope of
25 operational control, then it's an admission.

1 THE COURT: Okay. The request to exclude the
2 deposition is denied. The timing issue makes it important.
3 He doesn't note it in the complaint because he doesn't know
4 that it's happening. And it has been made part of the
5 pretrial statement that this is some evidence that Sargento
6 has decided to cut him out of the decision-making process.

7 Now, when you read the statements, they aren't as bold as
8 Mr. Fisher wants to argue them. In other words, it could
9 simply be interpreted as Mr. Linck was simply told that the
10 chain of command was through Mr. Gordy. There's nothing in
11 these designations that say that Mr. Linck was authorized to
12 talk to anybody except Mr. Gordy, which doesn't mean that
13 Mr. Calliari was necessarily excluded. But that's a weight
14 issue, not an admissibility issue.

15 MR. FISHER: And we did not designate the portion
16 where he said he sent some e-mails to him and not the others,
17 which may be a mistake. But I understand the ruling and the
18 comment.

19 THE COURT: Okay. Let's take our lunch. And I'll
20 see you back at 1:30.

21 (Lunch recess.)

22 THE COURT: Good afternoon. Are we ready for our
23 jury?

24 MR. SULKIN: We are, your Honor.

25 MR. GOLDFARB: Yes, your Honor.

1 THE COURT: All right. Let's bring them in.

2 (Jury enters courtroom.)

3 THE COURT: Please be seated. Good afternoon. We'll
4 continue with the witness, so let's give Mr. Goldfarb back
5 our attention.

6 MR. GOLDFARB: Good afternoon, your Honor. Your
7 Honor, at this time we move the admission of Exhibit 4, which
8 is the original Unilever manufacturing agreement. I believe
9 there's no objection.

10 MR. SULKIN: No objection.

11 THE COURT: 4 is admitted.

12 (Exhibit(s) 4 admitted.)

13 BY MR. GOLDFARB:

14 Q Mr. Gentine, you talked about it before lunch, but this is
15 the signature page from the original 2004 Unilever agreement.
16 This is a document you've seen before, is that correct?

17 A Yes.

18 Q And that's Mr. Calliari signing the document on behalf of
19 Portionables as the CEO, isn't that right?

20 A That's what it says, yes.

21 Q Sir, if I could have you turn in your book to Exhibit 20.

22 A Turn in these here?

23 Q Yes, sir. Sir, can you identify for the record the e-mail
24 in the lower part of the exhibit? Just tell the court what
25 it is, please.

1 A Excuse me. The e-mail in the lower part? Oh, there's two
2 e-mails, yes, uh-huh.

3 Q Yes. Can you identify that for the record?

4 A Yes. It was an e-mail from Steve Boland at Unilever to
5 me.

6 Q And this document has -- you'll see some different type on
7 it where there's some comments that had been interlineated.
8 I think I recognize that that is your style, is that correct?

9 A I think that was -- I think the parenthetical remarks here
10 were how what he was talking about differed from what we had
11 presented in August.

12 Q Okay. You reviewed this document at or near the time that
13 it's dated, is that correct?

14 A Yeah, I believe I did.

15 Q Okay. And this document was kept by Sargento in the
16 ordinary course of business? Is that also true?

17 A It was kept versus what?

18 Q Kept in your files as a part of your business records?

19 A Yeah, I expect it was kept in our files.

20 MR. GOLDFARB: Your Honor, move the admission of
21 Exhibit 20.

22 MR. SULKIN: Your Honor, we don't object.

23 THE COURT: 20 will be admitted.

24 (Exhibit(s) 20 admitted.)

25 BY MR. GOLDFARB:

1 Q Mr. Gentine, I've put the exhibit up on the screen now.
2 Do you see where this is a January 29, 2008 e-mail from
3 Mr. Boland at Unilever?

4 A Yes.

5 Q And this e-mail appears to reflect some communication
6 between Mr. Boland and yourself, is that right?

7 A Yes.

8 Q And this e-mail in fact shows the time at which Unilever
9 responded to the letter that had been sent some months
10 earlier by Mr. Calliari, does it not?

11 A Written response.

12 Q Yes. And there's some comments here that are in
13 parentheticals, isn't that also true?

14 A Yes.

15 Q And those parentheticals, weren't those added by yourself?

16 A I believe they were.

17 Q Yes. And what those show are the variances between what
18 had originally gone out and what came back from Unilever,
19 isn't that also true?

20 A Yes.

21 Q And what came back from Unilever as a counterproposal was
22 different than what was sent out some months earlier, isn't
23 that a fact?

24 A Yes.

25 Q And there was no deal between the parties at this time,

1 isn't that true? There was no amendment in place. What
2 there was, was some discussion between you and Mr. Boland as
3 of January 2008, correct?

4 A Well, we had made an offer to him, and he was coming back
5 with, as you would expect someone to do, with some suggested
6 twists to the offer.

7 Q He was making a counterproposal, isn't that right?

8 A You could read it as that, yeah.

9 Q Sir, let me ask you next to look at Exhibit 13, which has
10 already been admitted. This is the March 28 letter that came
11 from Mr. Calliari and Mr. Ioannides' attorney to your
12 attorney, isn't that correct?

13 A Yes.

14 Q And you saw a copy of this letter, isn't that also true?

15 A Yes.

16 Q And you learned from Mr. McEvoy after the fact that he had
17 requested that a letter be prepared setting forth the
18 concerns of the shareholders, isn't that also a fact?

19 A Yes, I did learn from that, yes, that he suggested he
20 should do something like that. I don't know that he
21 suggested it should come from an attorney. I think he
22 suggested that it was something that he should discuss with
23 me.

24 Q Mr. McEvoy specifically asked that the shareholders put
25 their concerns in writing, and that was reported to you,

1 wasn't it?

2 A Yes.

3 Q This letter, on the second page, indicated the view of
4 both Mr. Calliari and the shareholders that until the earnout
5 period was over, the Unilever contract should not be amended,
6 isn't that true?

7 A This came from the shareholders, and they were suggesting
8 that it should not be amended, yes.

9 Q Right. So you were on notice as of this date in writing
10 what the shareholders' position was, correct?

11 A Yes, I was informed at the time what the shareholders'
12 position was.

13 MR. GOLDFARB: Your Honor, move the admission of
14 Exhibit 8. I believe it's not opposed.

15 MR. SULKIN: No objection.

16 THE COURT: 8 will be admitted.

17 (Exhibit(s) 8 admitted.)

18 BY MR. GOLDFARB:

19 Q Exhibit 8, sir, is an April 4th, 2008, response to
20 Mr. Calliari, isn't that correct?

21 A Yes.

22 MR. SULKIN: Your Honor, if I may, I think Exhibit 8
23 that they have is missing the last page, which is a summary
24 of the chart. We have the same document with the chart.
25 It's a different exhibit number.

1 THE COURT: Why don't you show it to --

2 MR. GOLDFARB: I think counsel is correct, your
3 Honor. We can connect that up later. I have no opposition
4 to the other exhibit also. I don't intend to ask this
5 witness about --

6 THE COURT: All right. We'll make a substitution to
7 include the last page. But let's move forward.

8 MR. GOLDFARB: All right. Thank you, your Honor.

9 Q Now, Mr. Gentine, this letter is on your company
10 letterhead, isn't it?

11 A Yes.

12 Q But this letter was, in fact, prepared with the advice of
13 your attorneys, isn't that true?

14 A I would guess that I had the advice of the attorney. Once
15 you receive a letter from somebody -- from an attorney, you
16 obviously enlist the help of your attorneys in future
17 communications.

18 Q Right. And there's nothing wrong with that. But as a
19 factual matter, what happened is your attorneys either
20 drafted or assisted you in drafting this letter, correct?

21 A Uh-huh.

22 Q Is that a yes?

23 A Yes.

24 Q And in this letter, as of April 4th, what you say is: You
25 need to know specifically and how soon you intend to proceed

1 on the proposed amendment to the Unilever manufacturing
2 agreement. That "you" there is Mr. Calliari, isn't that
3 correct?

4 A Yes, it is.

5 Q That's the same party that had signed the original,
6 correct, the first original agreement?

7 A Yes.

8 Q It came to your attention, did it not, that Unilever was
9 planning to visit Bellingham on approximately April 15th?

10 A I don't recall the date, but sometime in April, yeah.

11 MR. GOLDFARB: Your Honor, move the admission of
12 Exhibit 24, which I also believe is not opposed.

13 MR. SULKIN: Let me just take a quick look. No
14 objection, your Honor.

15 THE COURT: 24 will also be admitted.

16 (Exhibit(s) 24 admitted.)

17 BY MR. GOLDFARB:

18 Q Sir, I've got that exhibit up on the screen. The lower
19 e-mail is from Mr. Calliari to Mr. Gordy. Mr. Gordy works
20 for you, is that correct? Well, he works for Sargento?

21 A He works for Sargento.

22 Q Okay. And he had some involvement with Portionables,
23 correct?

24 A Relatively significant involvement, yeah, uh-huh.

25 Q All right. And he has received this e-mail from

1 Mr. Calliari indicating that Mr. Calliari's intending to be
2 at the meeting with Unilever on the 15th of April, correct?

3 A Yes.

4 Q And that was forwarded to you, isn't that correct?

5 A Yes.

6 Q Okay. And you have some concern about Mr. Calliari
7 attending that meeting because of the possibility that he
8 would say to Unilever that Portionables wasn't signing any
9 amendment, just like what had been put forth in the letter
10 you received a few days earlier, correct?

11 A Well, actually, you can't read this letter by itself,
12 because Exhibit 8, which we've talked about before, had a lot
13 more writings in it. And it was a discussion with -- it was
14 a communication to Mr. Calliari that, you know, I was
15 concerned about where he was going after we received the
16 letter.

17 You know, after we received the letter on the 28th, George
18 Hoff and I had a phone call with him on April 2nd. And part
19 of the letter requested -- but it wasn't a request that he
20 would deny since he worked for me -- that he called me by the
21 following Monday. So he hadn't called me yet.

22 So I really didn't know where he stood as the president.
23 The letter on the 28th was Patrick and Mr. Ioannides as
24 shareholders. And that was how that letter came to us. In
25 fact, it came to us from the attorney that represented the

1 shareholders, not Patrick's attorneys who represented him as
2 an employee, who I believe was Foster Pepper.

3 Q My question again, sir, was a simple one. Were you
4 concerned about the possibility that at this meeting on the
5 15th of April, Mr. Calliari would just simply tell Unilever
6 that there would be no amendment? Yes or no?

7 A I was concerned because I had no idea what he would be
8 saying at that meeting.

9 Q You instructed your attorneys to send a letter to
10 Mr. Calliari's counsel a few days later, isn't that true?

11 A Quite possibly. I'm not certain what letter you're
12 talking about right this moment.

13 MR. GOLDFARB: Your Honor, move the admission of
14 Plaintiffs' 16. It's also unopposed.

15 MR. SULKIN: No objection, your Honor.

16 THE WITNESS: Which number is it?

17 MR. GOLDFARB: 16, sir.

18 THE COURT: 16 is admitted.

19 (Exhibit(s) 16 admitted.)

20 THE WITNESS: Okay.

21 BY MR. GOLDFARB:

22 Q Sir, Exhibit 16 is dated April 11, 2008, is that correct?

23 A Yes.

24 Q And it's on the letterhead of the law firm we talked about
25 earlier today?

1 A Reinhart Boerner.

2 Q Is that right?

3 A Yep.

4 Q That's your law firm, is that correct?

5 A Uh-huh.

6 Q This letter was written by your direction, with your
7 approval, isn't that correct?

8 A Uh-huh.

9 Q Is that a yes, sir?

10 A Yes, yes.

11 Q Sir, on this letter, on the second page, what I've
12 identified as paragraph -- or highlighted as paragraph 1,
13 your instruction was that Mr. Calliari shall take no further
14 action with respect to the discussions concerning the
15 Unilever amendment except after discussion and approval of
16 such actions by yourself, and that it had to be in writing,
17 isn't that correct?

18 A That's what it says, yes.

19 Q And that was issued at your specific direction, correct?

20 A Yes. Mr. Calliari worked for me. And I felt that at this
21 point in time I needed to preapprove his actions, which often
22 is the case with other people that report to me directly or
23 indirectly.

24 Q And, sir, there is no question, is there, that after this
25 letter, Mr. Calliari was removed from involvement with the

1 Unilever discussions?

2 A No. This didn't prevent his continued involvement. It
3 just required him to discuss things with me and get my
4 approval. So if he had, let's say, an alternate direction he
5 might want to go, it would require him to sit down, and we
6 could visit about it and make a determination on which way to
7 go. So it didn't keep him from being involved in future
8 activities relative to Unilever.

9 Q Isn't it true, sir, that after this letter was written, he
10 was excluded entirely from the Unilever discussion?

11 A I can't say that that is true that he was excluded
12 entirely from the Unilever discussion. There were
13 discussions that continued to go on. And, of course, we also
14 were not aware of what his position was relative to those
15 issues.

16 Q Is it a fact, sir, that on April 11th, 2008, the same day
17 that you had your law firm send this letter to Mr. Calliari's
18 attorney, that you also were in direct communications with
19 Unilever about the amendment?

20 A I, personally?

21 Q Yes, sir.

22 A From time to time, going way back to actually visiting
23 with Steve Boland prior to the acquisition, I had
24 conversations directly with Steve Boland, who, I guess, had
25 been the lead person relative to any negotiations with

1 Unilever.

2 Q Sir, if you could look at Exhibit 5, please.

3 A Uh-huh.

4 Q Can you identify Exhibit 5 for the record, please?

5 A Exhibit 5 is a -- looks like, again, it's two, maybe three
6 e-mails.

7 Q Sir, let me focus on just the first page of Exhibit 5, the
8 e-mail that takes up the bulk of the page. Can you identify
9 that for the court, please?

10 A That's where it says: Mike, I spoke to Steve Boland this
11 afternoon.

12 Q Don't read it into the record yet, sir.

13 A Oh, I'm sorry.

14 Q Just identify it for the record.

15 A I see it, yeah.

16 Q This is an e-mail from you to Mr. Gordy with copies to
17 Mr. Henkle and Mr. Hoff, isn't that correct?

18 A Uh-huh.

19 Q So this is an e-mail that you prepared, is that right?

20 A Yes.

21 Q And it's dated Friday, April 11, 2008, is that correct?

22 A Uh-huh.

23 Q This is an e-mail that you prepared in the course of your
24 work as the president and CEO of Sargento?

25 A Uh-huh.

1 THE COURT: Mr. Gentine, could I have you answer yes
2 or no?

3 THE WITNESS: I'm sorry. Yes.

4 THE COURT: It's very hard to get a record of uh-huh,
5 uh-uh.

6 THE WITNESS: I'm sorry.

7 MR. GOLDFARB: Your Honor, move the admission of
8 Exhibit 5.

9 MR. SULKIN: Your Honor, this e-mail has hearsay. I
10 object on that ground.

11 MR. GOLDFARB: Your Honor, I would show the witness
12 only the portion that we just identified. And I'm happy to
13 delete the attached e-mail.

14 THE COURT: With that limitation, is there an
15 objection?

16 MR. SULKIN: I'm not sure exactly what you are
17 referring to, Mr. Goldfarb.

18 THE COURT: He's intending only to show what was just
19 identified, which was Mr. Gentine's e-mail.

20 MR. SULKIN: My concern is, even with that e-mail, it
21 does refer to discussions with Mr. Boland, what Mr. Boland
22 said.

23 MR. GOLDFARB: These statements are a statement of a
24 party, your Honor.

25 THE COURT: It's at least admitted for what

1 Mr. Gentine believes are the facts. So the objection is
2 overruled.

3 MR. GOLDFARB: Thank you, your Honor.

4 (Exhibit(s) 5 admitted.)

5 BY MR. GOLDFARB:

6 Q Mr. Gentine, Exhibit 5 is an e-mail that shows the status
7 of the discussions that are ongoing between yourself and
8 Mr. Boland at Unilever, isn't that correct?

9 A Uh-huh, yes.

10 Q And it's dated April 11, 2008, the same day as your letter
11 to Mr. Calliari telling him to have no communication with
12 Unilever unless it's approved by you, isn't that true?

13 A Same date, yes.

14 Q And at the bottom of this exhibit, you indicate that you
15 expect to have the complete final drafts and have it done in
16 the next couple of weeks. And that was the status as of
17 April 11, isn't that correct?

18 A Yes.

19 Q Mr. Calliari still worked for Portionables in April 2008,
20 did he not?

21 A Yes, he did, but he was conflicted, he had told us, and
22 wasn't comfortable with his position relative to Unilever.

23 Q Well, sir, in fact, what he told you was exactly what was
24 set forth in the March 28th letter, which was not to sign the
25 Unilever amendment and to let him operate the company per the

1 agreements, isn't that so?

2 A Actually, I'm referring to the telephone conversation
3 George Hoff and I had with him on April 2nd.

4 Q Sir, if I could ask you to next look at Exhibit 34?

5 A I may not have 34, or else I've jostled it into another
6 position. Is it right before 40 and after 29?

7 Q It may be at the very bottom of your stack.

8 A Okay. There it is. Thank you. Okay.

9 Q Sir, I'm looking just at the first page of Exhibit 34.
10 Can you identify the lower e-mail for the record?

11 A An e-mail from George Hoff to Mike Gordy and myself, copy
12 to Jim Birenbaum, who was our corporate controller at
13 Sargento.

14 Q And what's the date of that e-mail, sir?

15 A April 15th.

16 Q And did you receive this e-mail at or near the time that
17 it was prepared?

18 A I'm not certain I can say that I received it at that time.
19 I could have been out of the office at 5:01 p.m.

20 Q But it's your general practice to review your e-mails more
21 or less contemporaneous with their receipt, is that correct?

22 A Generally, if I know that I have it.

23 Q And the sender of this e-mail is George Hoff, is that
24 correct?

25 A The sender, yes.

1 Q Okay. And Mr. Hoff is an employee of Sargento, is that
2 correct?

3 A Yeah. As I mentioned before, he's our chief financial
4 officer.

5 MR. GOLDFARB: Your Honor, move the admission of
6 Exhibit 34.

7 MR. SULKIN: No objection, your Honor.

8 THE COURT: 34 will be admitted.

9 (Exhibit(s) 34 admitted.)

10 BY MR. GOLDFARB:

11 Q Sir, attached to Exhibit 34 are a series of Unilever
12 contract comparison revenue documents, isn't that correct?

13 A Yeah, it says, Unilever contract comparison revenues.

14 Q And this document was prepared about four days after the
15 letter you sent saying that Mr. Calliari was to have no
16 contact with Unilever unless you approved it, right?

17 A The letter of April 11? April 15th, yes, four days.

18 Q Sir, it's true, isn't it, in this document, that Mr. Hoff
19 says not to share the data with anyone at Portionables except
20 Mac, of course?

21 A Yes, but I don't believe that included Patrick.

22 Q Well, Mac is Mr. McEvoy?

23 A It's Mike McEvoy, right.

24 MR. GOLDFARB: Your Honor, move the admission of
25 Exhibit Plaintiffs' 14.

1 MR. SULKIN: No objection, your Honor.

2 THE COURT: 14 will be admitted.

3 (Exhibit(s) 14 admitted.)

4 BY MR. GOLDFARB:

5 Q Mr. Gentine, Exhibit 14 is a May 23, 2008 letter to your
6 attorneys from the attorneys for Mr. Calliari, isn't that
7 true?

8 A Yes.

9 Q And you saw this letter approximately at the time it was
10 sent, isn't that also correct?

11 A I don't know if I saw it approximately at the time. But I
12 certainly, I am sure, saw it soon after it was sent.

13 Q As of the date of this letter, the Unilever amendment
14 still had not been executed, isn't that true?

15 A It hadn't been. Yes, it hadn't been executed.

16 Q And as of the date of this letter, Mr. Calliari was still
17 an employee of Portionables, isn't that right?

18 A Actually, again, I think he was an employee of Sargento.

19 Q I misspoke, sir. I appreciate the clarification. He was
20 still the president of Portionables pursuant to his
21 employment agreement, correct?

22 A Yes, uh-huh.

23 Q And this letter places Sargento on notice that
24 Mr. Calliari is invoking his right to resign for termination
25 for good reason under the employment agreement provision we

1 looked at this morning, correct?

2 A Well, you know, at the time I didn't realize it, but now I
3 realize it. Actually, this letter did not provide us proper
4 notice according to the stock purchase agreement or the
5 employment agreement. So it intended to do that, but it
6 didn't follow the intended rules.

7 Q Sir, you received this letter, did you not?

8 A I did receive the letter. Just saying that it didn't
9 follow the rules. It was supposed to be sent to me.

10 Q Do you understand what this letter is, that it provides
11 notice, is that correct?

12 A I understand that's what they intended it to do.

13 Q And do you know that before this letter was sent there was
14 a conversation between Jeff Miller, who's the center of this
15 letter, and Mr. Henkle, where Mr. Henkle requested that the
16 letter be sent by e-mail to expedite?

17 MR. SULKIN: Objection. Hearsay, your Honor.

18 A I wouldn't have any idea about that conversation.

19 THE COURT: Just a minute. Whether or not he knows
20 is a yes or no answer.

21 BY MR. GOLDFARB:

22 Q Are you aware of conversations between the attorneys where
23 there was a request made to e-mail this particular letter?

24 A No.

25 Q As I understand your testimony from this morning, you

1 personally thought that Portionables was not going to make
2 its earnout as of the date of this letter, is that fair?

3 A I would say based on the trend for the year and et cetera,
4 et cetera, I didn't think it would make its earnout.

5 Q But, of course, as we talked about this morning, you
6 couldn't know for sure until the earnout period was over,
7 correct?

8 A Well, to some degree. But as we talked about this
9 morning, if there wasn't solid discussions going with enough
10 customers to increase tonnage beyond a certain level, there
11 was no way that they were going to reach the earnout. And
12 there wasn't enough of that at this point in time. So I
13 think it had been a pretty good educated guess that they
14 weren't going to reach the earnout.

15 Q Now, what we found out is that later on in the year, both
16 plants were working at capacity. We talked about that this
17 morning, correct?

18 A Working at their capacity at that time didn't necessarily
19 mean that capacity was going to generate them the
20 profitability necessary to get their earnout.

21 Q Now, in the notice to cure that was sent on the 23rd with
22 regard to the Unilever contract, Mr. Calliari provided two
23 different options, did he not?

24 A Which page is that on?

25 Q I'm sorry, sir. It is on page 4 of the letter.

1 A Demand for cure. All right. I've got it here, uh-huh.

2 Q Now, with regard to the Unilever contract, Mr. Calliari
3 said that you should do one of two things, either not execute
4 the agreement -- do you see that?

5 A Yeah.

6 Q -- or, if you wanted to do it, he would agree that you
7 could execute it as long as you would simply credit the
8 shareholders with the full value of the original contract.
9 Do you see that?

10 A Uh-huh.

11 Q And Sargento's response to this letter, Exhibit 14, was
12 that Mr. Calliari could resign if he wanted to, but that
13 Sargento would make no changes to its decisions, isn't that
14 right?

15 A Yes.

16 Q And with regard to Mr. Calliari's --

17 A I don't believe we said he could resign for good reason.
18 He could resign if he wanted to.

19 Q Understood. But the core of my question is that, in
20 response to this letter and notice to cure, Sargento's
21 position was, no, we won't change a thing, correct?

22 A We weren't willing to make those changes.

23 Q And prior to making the proposal that's in Exhibit 14,
24 Mr. Calliari had also requested that the parties attend a
25 mediation, isn't that also true?

1 A Yes.

2 Q And the parties at that mediation were not able to resolve
3 their differences, isn't that correct?

4 A I'm not certain how I'm supposed to answer that question.

5 Q There was no resolution of the parties' differences at the
6 mediation, correct?

7 A By resolution, what do you mean?

8 Q A dispute continued after the conclusion of the mediation,
9 isn't that right?

10 A Yes.

11 Q The 30 days in the notice letter came and went without
12 Sargento changing its position, that's true, is it not?

13 A Yes.

14 MR. GOLDFARB: Your Honor, move the admission of
15 Plaintiffs' Exhibit 58.

16 MR. SULKIN: No objection.

17 THE COURT: 58 is admitted.

18 (Exhibit(s) 58 admitted.)

19 BY MR. GOLDFARB:

20 Q Sir, you received Exhibit -- or your counsel received and
21 furnished to you a copy of Exhibit 58, isn't that correct?

22 A Yes.

23 Q And you understood that in this letter Mr. Calliari was
24 asserting his right to resign for good reason, isn't that
25 true?

1 A Yes, he was asserting his right.

2 MR. GOLDFARB: Your Honor, plaintiffs move the
3 admission of Plaintiffs' 59.

4 MR. SULKIN: No objection, your Honor.

5 THE COURT: 59 is admitted.

6 (Exhibit(s) 59 admitted.)

7 BY MR. GOLDFARB:

8 Q Sir, Exhibit 59 is the amendment to the Unilever
9 manufacturing agreement, isn't that correct?

10 A That's what it says. I'm sure it is correct. I haven't
11 seen this in many -- in a long time.

12 Q Okay. It says it's dated as of June 30, 2008. Do you see
13 that?

14 A Is that at the start of it? Yeah, uh-huh.

15 Q Now, the last page shows that it was actually signed on
16 July 10th, isn't that right?

17 A Yes.

18 Q And the person who signed it on behalf of Portionables was
19 Mr. Gordy, is that right?

20 A Yes.

21 Q And Mr. Gordy worked for Sargento, is that correct?

22 A Yes.

23 Q Sir, if I could get you to return to Exhibit 2, the
24 employment agreement. On page 4, you see there's reference
25 to a signing bonus?

1 A Signing and retention bonus, yeah, uh-huh, within the
2 document.

3 Q And, in fact, was this signing bonus paid?

4 A The signing bonus was paid to Patrick at closing.

5 Q And that's what this agreement called for, is it not?

6 A Yes.

7 Q It says, payable as of the date hereof. And the date
8 hereof is the date of closing, is that correct?

9 A Uh-huh.

10 Q And it says that it's in consideration for executive's
11 execution of the agreement. Do you see that?

12 A Shall pay him a signing and retention bonus, yes.

13 Q But at the very beginning, sir, it says, in consideration
14 of executive's execution. So what he had to do to get paid
15 was to sign the document, correct?

16 A Well, I would say it was for him signing it and living by
17 the agreement, but, yeah.

18 Q Now, other than this provision of the employment
19 agreement, are you aware of any other reference in the
20 document at all to the signing bonus?

21 A Well --

22 Q And let me be clear with my question. Do the words
23 "signing bonus" or "signing and retention bonus" appear
24 anywhere else in the employment agreement other than on page
25 4 in Section 4(d)?

1 A I might have to read through the whole document to see
2 that. But assuming you have read through the document and
3 you are suggesting honestly that that's the situation, I
4 would agree with you. I assume that would be the case.

5 Q All right. Now, if Mr. Calliari was to terminate his
6 employment at Portionables and terminate this agreement,
7 whether for good reason or for no reason at all, would he
8 still have continuing duties under this agreement?

9 A Well, he would have continuing duties under this agreement
10 as well as the stock purchase agreement relative to
11 confidentiality and noncompetition.

12 Q And right now, sir, I'm focused on this agreement. If we
13 could go to page 6.

14 A Okay.

15 Q Section 6(b), sir, describes what Mr. Calliari's duties
16 are upon termination of employment. Do you see that?

17 A Uh-huh, yes.

18 Q And it requires that for a period of 24 months he not
19 compete as it's defined in this agreement, isn't that
20 correct?

21 A Yes.

22 Q And the idea of a noncompetition agreement is something
23 you are well familiar with, are you not?

24 A Pretty well familiar with it. I don't know if I'm well
25 familiar at the level you would be, but.

1 Q All right. And so the concept of the noncompetition
2 agreement is that you have someone that works for your
3 company who has access to information, customers, things of
4 that nature, and if they're going to leave, you want them to
5 stay out of your business for some period of time. That's
6 the basic idea, right?

7 A Yes.

8 Q And you had those sorts of arrangements with Mr. Calliari
9 in the employment agreement, correct?

10 A As you just stated, in Section (b).

11 Q So we look at Section 7 now. I'm again on page 8 of the
12 agreement. We looked at this this morning. Termination
13 without cause, do you see that?

14 A Uh-huh.

15 Q And in the event of termination without -- strike that.

16 In termination without cause, there's also a section that
17 relates to resignation for good reason by the executive, is
18 there not?

19 A There is reference -- can I just read what you are
20 thinking of here? There's something that says resignation
21 for good reason within the document.

22 Q I stated the question poorly. It's my fault. I'll try
23 again.

24 In the termination without cause section, it applies to
25 two different situations. One is where the company decides

1 to terminate the executive without cause. And the other is
2 where the executive terminates for good reason under the
3 agreement. You understand that, correct?

4 A You know, we discussed this during my deposition, I
5 believe. And in this particular case, as I said in my
6 deposition, I may be wrong, but if executive employment is
7 terminated by the corporation without cause and not due to
8 the executive's death or disability or by the executive for
9 good reason, the corporation shall continue to pay.

10 So I look at that as being an exclusion, similar to the
11 executive's death or disability. So I'm not certain that
12 we're reading it the same way, you and I. And I think we
13 discussed this during our deposition.

14 Q And is your decision not to pay Mr. Calliari any money in
15 this case resulting from his resignation based on that
16 reading you've just provided to the court of Section 7(c)?

17 A Well, it's based on, number one, we don't think that he
18 terminated for good reason, which would be our best, I guess,
19 the one at the top, termination for good reason. We didn't
20 believe he had good reason.

21 But down below, farther down, looking at it, even if he
22 had good reason, it wouldn't necessarily mean we would have
23 to continue to pay him, based on how I'm reading it. I
24 didn't draft this part of the document.

25 Q Sir, looking at Section 7(d), which is termination by

1 executive, do you see that?

2 A Uh-huh.

3 Q That covers the situation where Mr. Calliari simply
4 voluntarily resigns. Do you see that?

5 A Uh-huh, yeah.

6 Q And in that section, what it says is that his base salary
7 shall be prorated to the date of termination. Do you see
8 that?

9 A Uh-huh, yes.

10 Q It also says that if the termination occurs after December
11 31 of 2009, even if he terminates for no reason at all, you
12 will pay him something called a value award. Do you see
13 that?

14 A Yeah, yes.

15 Q And Section 7(d) makes no mention whatsoever of the
16 signing bonus, isn't that correct?

17 A No, there's no mention of the signing bonus in that
18 section.

19 Q And there's no mention in that section of proration of any
20 signing bonus, isn't that correct?

21 A Yeah. But there is another place in the document where we
22 would get to that.

23 Q And in the section right above termination without cause,
24 which we've just talked about, there's no reference there to
25 any signing bonus, correct?

1 A No.

2 Q And there's no reference there to any proration of any
3 signing bonus, right?

4 A No, there isn't.

5 Q But this section does address what it is that the
6 executive will receive in the event that this section
7 applies, correct?

8 A Well, it addresses those issues. But I believe somewhere
9 else in the document -- and I wouldn't be able to find it --
10 it indicates that we have the ability or we can look at other
11 remedies and we're not giving up the rights of those remedies
12 or something. So there's still an opportunity for us to
13 address other issues, I believe.

14 Q Let me ask you to look next at page 9 of this agreement.
15 I've got it on the screen for you, sir. Section 7(f) of the
16 employment agreement talks about what happens if Mr. Calliari
17 leaves. And this section also indicates that if his
18 employment terminates for any reason under Section 7, it
19 doesn't affect his obligations. Do you see those?

20 A I see where it says it shall not affect the executive's
21 obligations as described in Sections 6 and 8 and 11.

22 Q And 6, 8, and 11 have to do with confidentiality of
23 information, noncompetition, and inventions, isn't that
24 correct?

25 A I will have to look at it, but I'm going to just guess

1 that you're correct. I see the inventions as well, yeah.

2 Q Now, if I understand the arguments that are being advanced
3 by you and your company in this case, one of the things that
4 you are saying is that you think that Mr. Calliari should
5 have told you sooner what his views were about Unilever,
6 correct?

7 A Absolutely.

8 Q Okay. So, sir, if you would look at page 11, paragraph 14
9 of the employment agreement.

10 A Uh-huh.

11 Q Paragraph 14 is a provision entitled "waiver," isn't that
12 correct?

13 A Yes.

14 Q And what it says is: The failure of either party -- so
15 that would include Mr. Calliari, right?

16 A Yes.

17 Q -- to insist in any one or more instances upon performance
18 of the terms or conditions of this agreement shall not be
19 construed as a waiver or relinquishment of any right granted
20 hereunder or of further performance of any such term,
21 covenant, or condition. Do you see that?

22 A Yes.

23 Q And that's the agreement that was made in writing between
24 your company and Mr. Calliari, isn't that true?

25 A Yes.

1 Q Looking at the last page of the agreement, at paragraph
2 22, you also agreed that what's in the document is what the
3 deal is?

4 THE COURT: Excuse me. I believe you just misspoke.
5 It's 21.

6 MR. GOLDFARB: Oh, I'm sorry, your Honor. You're
7 absolutely correct.

8 Q Paragraph 21, sir, is entitled "entire agreement." Do you
9 see that?

10 A Yes.

11 Q And in that paragraph your company agreed that what's
12 written down here in the employment agreement is the entire
13 agreement between the company and Mr. Calliari concerning the
14 subject matter of the agreement, isn't that right?

15 A Yes.

16 MR. GOLDFARB: Your Honor, that's all the questions I
17 have this afternoon. Thank you.

18 THE COURT: Okay. Mr. Sulkin, do you wish to
19 examine?

20 MR. SULKIN: I do, your Honor.

21 THE COURT: How about, while you are getting to the
22 podium, why doesn't everybody stand up and stretch.

23 THE WITNESS: The witness, too.

24 THE COURT: Now you know why judges like to hear the
25 words "all rise."

1 Are you ready to go?

2 MR. SULKIN: I am, your Honor.

3 THE COURT: All right. Please be seated.

4 CROSS-EXAMINATION

5 BY MR. SULKIN:

6 Q Good afternoon, Mr. Gentine.

7 A Good afternoon.

8 Q I would like to spend a little time on your background, a
9 little bit more than Mr. Goldfarb did. First, I would like
10 to start with Sargento. Could you give us a little bit of
11 background about Sargento, how it got started. We don't want
12 a two-hour lecture, but just a short sort of synopsis of the
13 company.

14 A My father started Sargento in 1953. He was truly the
15 entrepreneur of the company. He unfortunately passed away in
16 1996. But my dad was a high school graduate, came from very
17 modest means in the city of Milwaukee and actually worked as
18 a machinist and had other types of jobs in Milwaukee in his
19 early years.

20 He enrolled in the Wisconsin Institute for Mortuary
21 Science and became an undertaker in the mid to later 1930's.
22 He and my mother moved to Plymouth in 1939, where he opened
23 up a funeral home.

24 Q Just for the jurors who are not from Wisconsin, where is
25 Plymouth in relationship to Milwaukee?

1 A I'm sorry. Everyone doesn't know that. Milwaukee is
2 located about two hours north of Chicago, basically on Lake
3 Michigan. Plymouth would be about another 45 minutes to an
4 hour north of there, about 15 miles off of Lake Michigan.
5 And that's where Sargento's headquartered as well today.

6 Anyway, he was an undertaker. Back in those times, he and
7 my mother happened to be Catholic. And back in the '30s and
8 '40s, Catholics tended to get buried by Protestants and vice
9 versa. You know, you can understand those things back at
10 that point in time.

11 So it wasn't a strong Catholic community, but he was
12 basically relegated to doing funerals for dead Catholics. So
13 he was always looking for different things to do. He tried
14 to raise mink for a while. And he got involved in a couple
15 other preliminary businesses that were somewhat cheese
16 related.

17 He also started a cheese store in Plymouth, which was --
18 at that time, people from Milwaukee and Chicago would be
19 going up to northern Wisconsin, to some of the tourists areas
20 in northern Wisconsin. And they would stop at the store.
21 And a lot of them went by bus at that time, by the way, not
22 so much cars.

23 They would stop at this store called the Plymouth Cheese
24 Counter, you know, which was right behind the funeral home in
25 an old carriage barn. And my grandmother worked there as

1 well. And they would buy product, generally on their way
2 home, or maybe take some up to the northern lakes of
3 Wisconsin.

4 He noticed that there was a growing interest in Italian
5 style cheeses. Now, today most people in this room would
6 think pizza was around forever in the United States. But,
7 quite honestly, prior to 1950, there were very, very few
8 pizza houses. There certainly weren't any Pizza Huts, things
9 like that.

10 But he saw a growing interest. So he thought there was an
11 opportunity to provide retail-sized packages of Italian style
12 cheese, specifically parmesan, Romano, mozzarella, and
13 provolone, to retail supermarkets. It was something that had
14 never been done before. Again, you say, well, God, must have
15 done that forever, but not actually the case.

16 So he got together with a close friend of his who lived
17 across the street. His name was Joe Sartori. And Joe had a
18 family business that actually produced Italian style cheeses
19 in Plymouth. And they combined their names, Sartori and
20 Gentine, Sargent, and added the O because that would make it
21 sound a little more Italian, Sargento. And they came out
22 with packages of Italian style cheeses. And that was the
23 start of the business.

24 My father was absolutely an entrepreneur. And that's how
25 our business took off. And over the years it grew due to

1 innovation. We were the first company to market shredded
2 cheese. And if any of you shop in the stores, there's plenty
3 of choices of shredded cheeses out there today. That was a
4 category that didn't even exist prior to Sargento and prior
5 to us developing that category.

6 Today we produce shredded cheese, sliced cheeses, snack
7 cheeses, and a few other varieties as well. Our largest
8 division is the consumer products division. And as I
9 mentioned earlier in my testimony, up until a week or two ago
10 was headed most recently by my son Louie.

11 We also have a food service division that focuses on
12 restaurant chains and things such as that. And there you
13 might find things like breaded mozzarella sticks, as an
14 example, that we produce for restaurants that they would
15 serve in restaurants, so other things besides the other kind
16 of styles of cheese I mentioned earlier.

17 And then we have what we call our food ingredient group.
18 And that's basically industrial, where we would sell other
19 food companies cheese for whatever needs that they need it.

20 Q And when did you get involved in the company, sir?

21 A With the family business, again, back in the '50s, you
22 could get involved much earlier than you can legally get
23 involved today. My dad had his kids working in the plant
24 probably by the time we were nine or ten, doing the most
25 menial of jobs because it was a family business.

1 I worked there through high school. I also worked there
2 summertimes through college. I then went off, worked for --
3 after I graduated, I went to the University of Notre Dame. I
4 went to work for Pricewaterhouse, an accounting firm in
5 Hartford, Connecticut, for three years. And then I returned
6 to the company in '73 in accounting and financial roles for a
7 number of years.

8 I shared the responsibility of what we call the office of
9 the president, which was really three presidents, my brother,
10 myself, and one nonfamily member, for a year or two. And in
11 1981, the board appointed me as the president and chief
12 executive officer, which was a position I've held ever since
13 1981. I guess I may be one of the longest standing
14 presidents and chief executive officers around the country at
15 this point.

16 And I became the chairman following my father's death in
17 1996. He was very inactive, but he was the founder, and we
18 maintained his role of chairman until he died of Parkinson's
19 disease.

20 Q Are you married?

21 A I am married to my wife, Michelle. We're celebrating our
22 40th anniversary this year. We have -- we had four children.
23 We unfortunately lost our third son at a very, very early
24 age. But our oldest son, Tony, is a teacher, lives in our
25 general vicinity, ten miles from our house, has four

1 children. Louie, who we mentioned earlier, obviously lives
2 in the same area. He and his wife also have four children.
3 And then I have a daughter, Kelly, who is still single and
4 involved in marketing and living in Colorado at this time.

5 Q I want to take us now to sort of how you got interested --
6 you, meaning your company -- in Portionables. Could you tell
7 us about how that came about? I know you talked a little bit
8 to Mr. Goldfarb about it. But if you could expand on why you
9 were interested in Portionables and what you saw in that
10 company?

11 A Well, as I mentioned, you know, we're in the natural
12 cheese business. In fact, we always talk about the fact that
13 our focus is cheese, cheese based and other culinary
14 solutions. And we were looking at ways to provide added
15 value to the consumers or to our customers by making it
16 easier for them to use our products.

17 A lot of our products are clearly all about quality and
18 all about convenience for the consumer or the customer, how
19 can they use these things easier. So we felt that the sauce
20 area was an area that provided a lot of opportunities. And,
21 in fact, we had had some discussions with other sauce
22 companies prior to getting involved with Patrick and his
23 company.

24 But we did a study. There was a research firm; I believe
25 it was called Technomics. They do this kind of stuff. They

1 helped us research the various companies that were active in
2 the field of sauces. And then basically they did sort of a
3 sorting, I guess, similar to what went on with the jury thing
4 earlier, to say, well, which ones made sense, which ones
5 didn't.

6 You know, if the company was involved in nothing but soy
7 sauce, it really wouldn't fit cheese. But they might have
8 some products like that. And, quite honestly, I think
9 Portionables probably does some sauces that aren't cheese
10 sauces. But we were looking for companies that had, you
11 know, a little more of a relationship to what we do at
12 Sargento.

13 Q And in some --

14 A And Portionables was one of the companies that this
15 organization, research company, suggested would be something
16 we'd want to look more closely at.

17 Q Now, did you have discussions early on with Mr. Calliari
18 about purchasing Portionables?

19 A Yeah, we had discussions after I met him, obviously.

20 Q And tell us about the first discussion you had. Did you
21 get into any details with him about a potential purchase?
22 Were you just looking at the company? How did that come up?

23 A Well, the initial discussion was -- it was actually
24 somewhat of a visit to Bellingham where we got to see a
25 little bit of the facility. Patrick was understandably

1 guarded about what he would show somebody that's interested
2 in getting into the sauce business, because if he didn't sell
3 to us, he certainly didn't want to give us too many clues
4 about what he was doing there.

5 But we went out to visit, myself and, I believe, Bob
6 Clouston. And at that time Kevin Delahunt was the president
7 of our food ingredients group, or that group that services
8 other food companies. And the three of us went out and
9 visited with Patrick. I'm sure we had dinner with him. And
10 it was our initial visit.

11 And then obviously we let him know of our interest and
12 wanted him to get back to us if he had an interest in talking
13 further.

14 Q At some point you received a letter -- I think it was
15 shown to you -- from Mr. William Beard. Would you look at
16 Exhibit No. 15.

17 MR. SULKIN: I think it's already been admitted, your
18 Honor.

19 A Bill Beard was a, as I understand it, was like a company
20 sales consultant that was being used by Patrick Calliari,
21 because, as it was mentioned by Mr. Goldfarb, I believe it
22 was Mr. Goldfarb before, as it turns out, we weren't the only
23 company looking at Portionables at that time.

24 Q Now, Mr. Goldfarb showed you portions of this document.
25 I'd like to show you a different paragraph that wasn't shown

1 in your earlier examination. The issue of operational
2 control, we've been talking about that for a few days now.
3 He addresses it, does he not, in the third paragraph of his
4 e-mail to you?

5 A Yes, he does.

6 Q And I'll read it to you. It says: Operational control:
7 Mr. Calliari would have full operational control of
8 Portionables during the earnout period, continuing his title
9 and duties as CEO in accordance with the employment
10 agreement. Do you see that?

11 A Yes, I do.

12 Q So this was January 30th of '07, which is three months
13 prior to the deal being signed?

14 A Uh-huh.

15 Q We need a "yes."

16 A Yes.

17 Q Okay. I will be interrupting you, as I remember, to
18 answer yes or no.

19 A Yes.

20 Q Okay. Were you willing to give him at this time full
21 operational control?

22 A I wasn't comfortable with either full operational control
23 or duties of CEO. No, absolutely not comfortable with that.
24 But this was a proposal they were making us.

25 Q And did you send a letter back countering that?

1 A Yeah, I did. I sent a letter back that countered, I
2 believe, not just the issue of full operational control and
3 him being the CEO. I think at that second stage we got to
4 the point I said I would be willing for him to have primary
5 -- I think I used the term "primary operational control."

6 But I think at that time also -- well, no, I think that
7 later on, following that, we had one more thing. We got down
8 to just calling it operational control and that he would be a
9 division president.

10 Q Why did you not want him to have full operational control
11 and duties of a CEO? What was the problem with that?

12 A Well, the problem with that was we were paying 19 million
13 dollars for the company. It was going to be our company. 19
14 million dollars was a significant premium over what the
15 company was worth if it didn't earn any more than it had been
16 doing over the last number of years, where I had earlier
17 stated that it wasn't particularly successful.

18 So we were giving him a nice kicker with the 19 million
19 dollars. And, of course, he had the opportunity for this
20 contingent payment as well. So we weren't willing to do
21 that.

22 Added to that, I am the CEO of the company. And I'm
23 certainly not going to give control to somebody that -- a
24 company that we just met, to give them that type of control.

25 Q Take a look, if you would, at Exhibit No. 1.

1 A Okay.

2 Q Without getting into the contents, is that your signature
3 at the bottom of the letter?

4 A Yes.

5 Q And you sent this to Mr. Calliari?

6 A Yes, to Patrick Calliari.

7 Q On or about February 7th?

8 A Uh-huh, yes.

9 MR. SULKIN: Your Honor, move for the admission of
10 No. 1. I don't think there's any objection.

11 MR. GOLDFARB: It's actually our exhibit, your Honor.
12 No objection.

13 THE COURT: 1 is admitted.

14 (Exhibit(s) 1 admitted.)

15 BY MR. SULKIN:

16 Q First, why did you write this letter?

17 A Well, again, this was to talk about a proposal on how we
18 could -- we were responding to the letter from Bill Beard
19 with changes that we felt were necessary.

20 Q Take a look, if you would, at the third bullet point that
21 begins with: It would be our expectation.

22 A Yes.

23 Q You wrote: It would be our expectation that during the
24 earnout period, the Portionables business would remain
25 largely segregated from Sargento's other businesses and you

1 would retain primarily operational control. Do you see that?

2 A Yes.

3 Q And how did you see primary operational control different
4 from full operational control?

5 A Well, I think full operational control would be full.
6 Primary would mean that there wouldn't be -- there would be
7 some issues that he would be having such control of.

8 Q And did you have discussions at this time with
9 Mr. Calliari about the issue of operational control?

10 A About this time, or following this letter?

11 Q Let's talk about first at this time.

12 A Well, I think we had discussions. I don't recall exactly
13 the details of the discussions back and forth. This was on
14 February 7th. I'm quite certain he came to visit us back in
15 Plymouth again. I'm not certain on the details on that.

16 Q Take a look, if you would, at the next bullet point. It
17 reads -- and this is what you were requesting from him?

18 A Uh-huh.

19 Q All right. The requirement that you agree to a multiyear
20 employment agreement, including a noncompete agreement, that
21 would provide appropriate incentives for your continuing role
22 and significant long-term incentives tied to the performance
23 of Sargento's overall business through its phantom stock
24 plan.

25 I'm going to stop there. What were you trying to convey

1 here? Why did you want that as part of any deal with
2 Mr. Calliari?

3 A Well, because Patrick, although the company wasn't doing
4 financially well, but we're somewhat familiar with that
5 because, quite honestly, Sargento didn't do all that
6 financially well in its earlier years, as hard as my dad
7 struggled with it for many, many years, but at the same time,
8 we respected the fact that Patrick had come up with a good
9 idea here and that there was potential for that idea.

10 But we didn't believe that potential could be, let's say,
11 totally -- I don't want to use the word mine, but we wouldn't
12 get the full potential of the company without Patrick's input
13 and involvement going forward.

14 Q At some point did you have a discussion with Mr. Calliari
15 concerning the financial performance of the company?

16 A Yeah, we had, I'm sure, a number of conversations relative
17 to the past financial performance of the company, as well as
18 what he projected the financial performance of the company
19 could be going forward.

20 Q And what did you come to learn from him about that?

21 A Well, the company was struggling when we talked to him.
22 They had the Unilever agreement for Bellingham. And as was
23 stated earlier, it appeared to be the only product that was
24 being produced, or only meaningful product being produced in
25 Bellingham.

1 They had built a new facility in South Dakota, North Sioux
2 City, South Dakota. I believe there's a South Sioux City,
3 North Dakota, too, which is interesting, but North Sioux
4 City, South Dakota, which they built primarily to service two
5 other major companies, Con Agra and General Mills.

6 I think General Mills was probably his first big account.
7 But after or during the construction -- I'm not certain what
8 the exact timing of that plant was -- General Mills came to
9 Patrick and wanted price concessions. And he told us he had
10 offered them price concessions, but apparently not enough to
11 keep them as a customer, and they left him as a customer.

12 So because of that -- and, apparently, I believe that Con
13 Agra, that it was a similar situation, where they were also
14 asking price concessions. And he offered price concessions
15 to Con Agra as well. In that case he may have saved part of
16 the business by those price concessions.

17 But because of that reduction in business -- and, again, I
18 think the General Mills business may have been larger than
19 Unilever -- suddenly they had a new plant ready to go and
20 nothing to run down the lines.

21 And the term "burden" is used a lot in financial
22 statements. They had a great deal of burden with the North
23 Sioux City plant and virtually no products to run on it.

24 Q Did Mr. Calliari address what he believed the future
25 looked like concerning sales for Portionables at that time?

1 A Yes, he did. He had -- and, again, I mentioned earlier
2 the whole concept of hockey stick projections. But he had
3 projections where he felt that the company could grow to
4 levels of over 70 million pounds of product, which would have
5 been, I believe, probably three times what they were at this
6 point in time.

7 Q Would you take a look --

8 THE COURT: We need to find a place to stop.

9 MR. SULKIN: This would be a good place, your Honor.

10 THE COURT: All right. Ladies and gentlemen, why
11 don't you close up your notebooks, and you may be excused to
12 the jury room.

13 (Jury leaves courtroom.)

14 THE COURT: Okay. Anything we need to take care of
15 before we recess?

16 MR. SULKIN: Not from us, your Honor.

17 MR. GOLDFARB: Just one thing, your Honor. Motion in
18 limine No. 5 is about to come into sharp relief. And I'm
19 happy to address some of that now outside the presence of the
20 jury if the court thinks that is more appropriate. But we
21 got their exhibits over lunchtime, and there were a number of
22 related documents that are going to be a problem, and if we
23 could get that clarified.

24 THE COURT: Well, let's sit down. What's going to
25 come up here?

1 MR. SULKIN: Your Honor, the next document I intend
2 to show him is Exhibit 215. These were projections given to
3 them during the negotiation period. And what I'm interested
4 in is just showing comparisons, the last four columns, 2005,
5 2006, 2007, 2008, in which Mr. Calliari does make certain
6 projections as to what will happen.

7 We had testimony that they brought out on this very issue.
8 It's part of the negotiation process. And it explains why
9 they paid what they did. And it gives background to the
10 calculation.

11 I don't intend to go into EBITDA. I will say that
12 Mr. Goldfarb already has, to a certain extent, by explaining
13 it and asking him questions about it and how it works and
14 everything else. And so I certainly don't intend to go that
15 deeply into it. But I find it appropriate for us to provide
16 documents that were part of the negotiation process and why
17 this sale took place, through this witness.

18 THE COURT: Mr. Goldfarb.

19 MR. GOLDFARB: Your Honor, I think, if you start at
20 the back and look at Exhibit 288, this is the most extreme
21 example, your Honor, but this is the contingent payment
22 report that is the subject. It's discussed at some length in
23 our dispute over the motion to compel arbitration. But this
24 is prepared nine months after Mr. Calliari leaves.

25 And if your Honor recalls the motion in limine, the

1 position was that we could have no discovery whatsoever into
2 this subject, that their view was it had to be done in the
3 arbitration. So there's been no discovery into this document
4 at all.

5 There are other subsidiary documents leading up to this.
6 But it's just horribly unfair if we're going to litigate now
7 the EBITDA questions. And, again, this is not of our making.
8 We tried to get this discovery, and they absolutely refused
9 to provide it.

10 THE COURT: Okay. So you haven't seen 288
11 previously?

12 MR. GOLDFARB: No, your Honor. We've seen 288.

13 THE COURT: But you weren't allowed to ask questions
14 about it?

15 MR. GOLDFARB: Right. And let me tell you what 288
16 is. 288 is their report that they provided under the stock
17 purchase agreement where they say this is what EBITDA turned
18 out to be. And then it attaches these schedules. And I can
19 go on for 45 minutes about just preliminarily what the
20 disputes are about this, how they didn't raise prices during
21 some of this EBITDA period once Mr. Calliari was gone, that
22 they shut down the plant to do maintenance. Those are the
23 arbitration disputes that aren't for here.

24 But this trial takes on a very different complexion if
25 your Honor's going to allow these sorts of documents, and

1 this one in particular. But this whole financial story --
2 and it's just, you know -- I mean, we really tried to get
3 these documents in discovery in this case, and they were
4 adamant that they weren't coming in. So that's why we set
5 the motion.

6 THE COURT: Okay. So right now I've got 215 in front
7 of me. Is there an objection to 215, Mr. Goldfarb?

8 MR. GOLDFARB: Well, there is, your Honor, on two
9 fronts. One is just how is it relevant to what we're doing
10 here? And the second is that, without the whole financial
11 discovery into the company, we can't really explain or
12 address it.

13 THE COURT: Except 215 is your client's projection.
14 So certainly you had that.

15 MR. GOLDFARB: That's true. But the next question is
16 going to be: What happened? And as soon as that door swings
17 open, I'm in the dark.

18 THE COURT: All right. So let's assume the next
19 question is not what happened. What's the problem with 215?

20 MR. GOLDFARB: Okay. Then the only question at that
21 point is how is it relevant to the dispute between the
22 parties?

23 THE COURT: Well, we certainly have a lot of
24 information about the French coming after this company, about
25 what the offers were, how 19 million was going to go to the

1 shareholders, 1 million was going to go to Mr. Calliari,
2 where they met. You know, we've heard about the airport.

3 To be perfectly honest, I don't know why anybody is going
4 into any of that. But you certainly have talked plenty about
5 how you got to negotiations. I mean, I know where they had
6 their dinners.

7 So I guess what I'm saying is, how does this hurt you, and
8 why does it not complete the picture that everybody's
9 puffing? One side wants the price lower, one side wants the
10 price higher, and they come to an agreement?

11 MR. GOLDFARB: If it stops there, your Honor, and
12 doesn't turn into what happened to these numbers, I
13 understand that approach. What I'm concerned about is we
14 really have not been allowed to depose or get any kind of
15 documents to drill down inside the performance of the
16 company.

17 THE COURT: All right. Now, Mr. Sulkin, tell me
18 about 288.

19 MR. SULKIN: Your Honor, I probably shouldn't say it
20 this way, but I don't feel all that strongly about it. The
21 only point I wanted to use it for is for the sales numbers.
22 But I'm willing to withdraw 288.

23 THE COURT: Okay. 288 isn't here. And if you want
24 to use 215, it's simply: These are what everybody hoped for.

25 MR. SULKIN: Exactly.

1 THE COURT: Period.

2 MR. SULKIN: Exactly right. That's all I intend to
3 do.

4 THE COURT: But we're going to stay out of the
5 earnout calculations. We all know the formula. But we're
6 not going to lay in front of this jury what anybody thinks
7 they are or were. You decided to take that elsewhere.
8 You've got to take it elsewhere.

9 MR. SULKIN: I do not intend to raise that issue with
10 this witness, your Honor, other than there was some allusion
11 made by Mr. Goldfarb as to why you would pay 6 dollars for
12 one. In other words, why would you pay so much in an
13 earnout. I intend to ask him why that makes sense. But I
14 don't intend -- it's a theoretical question. You're paying
15 for a stream of income. That's why it makes sense to us,
16 period.

17 I think the implication they are trying to draw, your
18 Honor, is that we had incentive to stop them from making the
19 earnout. And that's why they raise the subject. All I want
20 is for this witness to explain that wasn't true. In fact, we
21 wanted to make the earnout. And the financial stream of
22 income would more than cover that. And that's the only issue
23 I intend to raise.

24 THE COURT: Then you talk about his rationale. You
25 don't talk about his numbers.

1 MR. SULKIN: Fair enough.

2 THE COURT: Okay. Everybody clear on that?

3 MR. GOLDFARB: We are, your Honor.

4 THE COURT: Okay. Then let's take a break. We'll be
5 at recess.

6 (Brief recess.)

7 THE COURT: Okay. Are we ready to go?

8 MR. GOLDFARB: Yes, your Honor.

9 MR. SULKIN: Yes, your Honor.

10 THE COURT: All right.

11 (Jury enters courtroom.)

12 THE COURT: Okay. Ladies and gentlemen, please be
13 seated. This is the end of the 7th inning stretch, coming up
14 at the end of the day. Let's continue.

15 MR. SULKIN: Thank you, your Honor.

16 Q Mr. Gentine, we just went from full operational control of
17 the CEO, Exhibit 15. And Exhibit 1 was primary operational
18 control. And we're going to get to Exhibit 2. The jury has
19 seen it plenty of times.

20 I want you to tell us, if you can recall, what was -- any
21 discussions you had on the subject with Mr. Calliari. But
22 before I do, I want to ask you this question: Do you, as you
23 sit here today, specifically remember when these particular
24 discussions took place among the three or four you had with
25 Mr. Calliari?

1 A No.

2 Q Okay. So what I want you to do is tell the jury as best
3 you can what you do recall about these discussions relating
4 to how we get to the language that's in the contract
5 concerning the issue of operational control.

6 A Well, the letter I sent, where I said primary operational
7 control, there were different issues there that weren't
8 agreed upon by, obviously, both sides. And we ended up with
9 a -- Patrick and I, I believe, met somewhere in Plymouth. I
10 think he came, and we had discussions on operational control.

11 And I said: You know, I think what makes the most sense
12 here is that we put in just operational control and that you
13 will serve as a -- in the same role as a division president.
14 And if you have any issues with whether or not your
15 operational control is being hindered, then come to me. I
16 have an open-door policy.

17 I have an open-door policy with everybody in the company.
18 I meet regularly with employees in our factories and
19 everywhere else where they have an issue with this or that.
20 That's what a family business is really all about.

21 I told him: You can come at any time. And, quite
22 honestly, up until the letter on March 28th, I think Patrick
23 and I had a great relationship relative to communicating back
24 and forth. But included in that relationship, there wasn't
25 any notice that I was doing anything wrong.

1 I think that, in discussing it, it probably was with
2 attorneys involved again following our discussions that there
3 was a discomfort with just come and talk to me. And that's
4 where the language was put in relative to termination for
5 good reason, where we actually put language in the document
6 beyond just coming to me and talking to me.

7 Q Let's jump to Exhibit No. 2. I'll show the first page to
8 the jurors so they know where we're at. And if you could, if
9 you could turn first to page No. 7, which is the termination
10 provision at the bottom. And then if you could turn the page
11 to page 8, pull out the good reason provision. Is this what
12 you were referring to, Mr. Gentine?

13 A Uh-huh, right.

14 Q Okay. And what it says here is, if I may read it: Good
15 reason. Termination for good reason shall mean the
16 termination of executive's employment by executive following
17 a material breach by the corporation of any provisions of
18 this agreement, which failure continues for a period of 30
19 days after the corporation's receipt of written notice from
20 executive specifying the details of such alleged failure.

21 Do you see that?

22 A Yes.

23 Q Okay. Is it your testimony that this came out of -- this
24 was a lawyered version of a discussion you had with
25 Mr. Calliari?

1 A Yes.

2 Q Okay. Now, I'm just going to ask you a series of
3 questions about that issue, okay? At any point prior to
4 March 28, 2008, that is the Weinstein letter, did
5 Mr. Calliari send you notice pursuant to this provision?

6 A No.

7 Q At any point prior to March 28, 2008, did Mr. Calliari
8 walk into your office, your open-door policy, and say that
9 you were taking his operational control on any issue?

10 A No.

11 Q At any point prior to March 28, 2008, did Mr. Calliari
12 send you an e-mail --

13 MR. GOLDFARB: Excuse me, your Honor. These
14 questions are highly leading in nature.

15 THE COURT: They are. Sustained.

16 BY MR. SULKIN:

17 Q Mr. Gentine, at any point did you receive notice from
18 Mr. Calliari relating to this issue concerning operational
19 control prior to March 28, 2008?

20 MR. GOLDFARB: Same objection, your Honor.

21 THE COURT: Overruled.

22 A I never received any objection from him at all relative to
23 any issue about operational control. And Patrick and I
24 visited regularly, primarily on the phone. We obviously had
25 e-mails going back and forth from time to time. I think he

1 was much more comfortable with telephone, or we visited in
2 person from time to time as well. It never came up.

3 BY MR. SULKIN:

4 Q Okay. I want to now go back to the first page of Exhibit
5 No. 2. And the jury has seen this plenty of times. So we'll
6 try and go through it a little bit quicker if we can. The
7 duty section, paragraph No. 3, if you could pull that up for
8 me, down at the bottom, last paragraph.

9 In your mind, did this make it clear what Patrick's role
10 was?

11 MR. GOLDFARB: Objection, your Honor. Witness'
12 subjective view of the subjective contract is not relevant.

13 THE COURT: I'm sorry. I did not hear you,
14 Mr. Goldfarb.

15 MR. GOLDFARB: I'm sorry, your Honor. I said that
16 the witness' subjective view of the meaning of this language,
17 if it's not objectively manifested, it is in violation of the
18 objective manifestation rule. So it's not relevant.

19 THE COURT: Okay. Pose the question again, please.
20 I want to hear it before the answer.

21 MR. SULKIN: Let me rephrase it.

22 Q Mr. Gentine, did this provision capture accurately the
23 discussions you had with Mr. Calliari, at least in part,
24 relating to where he stood vis-a-vis you in the hierarchy
25 within Sargento?

1 MR. GOLDFARB: Leading, your Honor.

2 A Yes.

3 THE COURT: Sustained.

4 THE WITNESS: I'm sorry.

5 MR. GOLDFARB: Your Honor, so my record is clear,
6 move to strike.

7 THE COURT: The jury will disregard the last question
8 and the last answer.

9 BY MR. SULKIN:

10 Q At any point did Mr. Calliari claim that he was not in the
11 role of a division head?

12 A Not that I can recall.

13 Q At any point did Mr. Calliari, prior to the dispute in the
14 spring of 2008, did he ever claim that you weren't his boss?

15 A No.

16 Q Did you have the right under this agreement to assign
17 duties to him?

18 MR. GOLDFARB: Objection.

19 A Yes, I did.

20 MR. GOLDFARB: Objection, your Honor. Calls for a
21 legal conclusion.

22 THE COURT: Rephrase the question as to what he
23 thought his position was to be able to assign the duty.

24 And, Mr. Gentine, you've got to let me do my job. Most
25 days I like my job. But if you talk over the top of the

1 objection, I can't do my job. So please --

2 THE WITNESS: I was talking before I understood that
3 there was another objection coming up. I'm sorry, your
4 Honor.

5 THE COURT: So once the question is asked, please
6 take a deep breath. Let me jump in if I need to.

7 Go ahead.

8 BY MR. SULKIN:

9 Q Mr. Gentine, was it your understanding in this provision
10 that you had the right to assign duties to Mr. Calliari?

11 MR. GOLDFARB: Your Honor, this examination is very
12 leading in nature.

13 THE COURT: It is. You have to not lead him. Who,
14 what, when, how, why.

15 MR. SULKIN: Okay. Your Honor, I'll try it this way.
16 I don't intend to be leading.

17 Q Mr. Gentine, how did this provision set forth the relative
18 roles in your mind between you and Mr. Calliari, that is,
19 paragraph No. 3 of page 1 of the employment agreement?

20 THE COURT: Go ahead. You can answer.

21 A Well, as it's written, I was the president and chief
22 executive officer, and he was under my direction. So that
23 gave me the ability to assign duties to him. I asked him to
24 do different things that I would ask anybody else reporting
25 to me to do.

1 BY MR. SULKIN:

2 Q I would like you to take a look now at Exhibit No. 3,
3 which is the stock purchase agreement. What was your
4 understanding of the relationship between the stock purchase
5 agreement and the employment agreement to Mr. Calliari?

6 A My view on the stock purchase agreement and employment
7 agreement with Mr. Calliari is that the two of them were sort
8 of sealed at the hip, whatever the term is, but basically
9 that they were together. They depended on each other, and
10 they could not be read separately.

11 Q Let's take a look at page 45, paragraph 9.9, of the stock
12 purchase agreement. Could you read this paragraph for me,
13 please?

14 A Entire agreement. This agreement, together with the
15 additional agreements, the company disclosure schedules, the
16 exhibits, and other writings referred to herein or delivered
17 pursuant hereto constitutes the entire agreement among the
18 parties and supersedes any other agreements, whether written
19 or oral, that may have been made or entered into by or among
20 the company, the shareholders, or by any director or
21 directors or officer or officers of such parties relating to
22 the transactions contemplated hereby, or incident hereto.
23 And it says, no.

24 Q Okay. And if we could take a look at page 38, additional
25 agreements. Do you see that?

1 A Yes.

2 Q And additional agreement, what was defined as one of the
3 additional agreements relative to your answer concerning the
4 relationship between Exhibit 2 and 3?

5 A One of them means the escrow agreement, the Calliari
6 employment agreement, and then other things.

7 Q Now, I'd like you to take a look, just to backtrack a
8 little bit, at Exhibit No. 215. Did you receive a copy of
9 this document during the negotiations of the purchase of
10 Portionables?

11 A At some point, yes.

12 Q From whom did you receive it?

13 A I would have received it, I assume, from Patrick or
14 possibly Bill Beard, who was the representing agent for
15 Patrick.

16 MR. SULKIN: Your Honor, I move for the admission of
17 Exhibit 215.

18 MR. GOLDFARB: No objection, your Honor.

19 THE COURT: 215 is admitted.

20 (Exhibit(s) 215 admitted.)

21 BY MR. SULKIN:

22 Q Mr. Gentine, what was your understanding with this exhibit
23 when you received it from Mr. Calliari or Mr. Beard?

24 A Well, it was the description of the potential of what
25 Portionables could be over the next couple of years, 2007 as

1 well as 2008. As you saw -- and, again, this is that hockey
2 stick type of performance that we talked about earlier, that
3 based on 2007 there was a potential of --

4 Q Let me see if I can take you through it. Are you
5 referring to the sales line in the last, say, four columns,
6 in the years 2005, 2006, 2007, 2008?

7 A Well, the sales were going to jump dramatically. In fact,
8 I think I referred to those numbers before. Somewhere in the
9 70's -- it was actually almost 75 million, compared to 26
10 million in 2006. It was almost a tripling of sales. So
11 there was great potential for sales increase, which would
12 drive EBITDA down at the bottom.

13 Q Just so we're clear, 2006 you understood to be actual
14 sales. In 2007, 2008, did you understand them to be actual
15 or projections?

16 A Well, 2007 and 2008 would have been projections. And I'm
17 not certain if 2006 was still somewhat of a projection based
18 on the time we would have looked at this. They may not have
19 had final numbers yet for 2006. But I'm sure they would have
20 been a very close approximation of what the results for 2006
21 would be. Previous years, I would have guessed that those
22 were actual.

23 Q Thank you. Take a look, if you would -- I want to go back
24 now to Exhibit No. 3. Go to paragraph 1.6(b). That's on
25 page 4. And Mr. Goldfarb went through this with you. And he

1 went through the various six items there. Do you see that?

2 A Yes.

3 Q He talked with you a little bit about, it says here -- let
4 me just read it, so I'll situate us. It says:

5 Notwithstanding the understanding concerning control of the
6 company by the shareholders' representative described above,
7 the parties understand that certain actions which are likely
8 to have a material financial impact on the company after the
9 contingent payment due date will require the consent of the
10 purchaser. And the purchaser is whom?

11 A Sargento.

12 Q And so if Mr. Calliari -- if one wanted to enter into
13 terminating or materially amending any consent contract, it
14 would mean you have to agree?

15 A Yes.

16 Q Is there anything in this provision that requires him to
17 agree if you decide to amend a contract?

18 A Absolutely not.

19 Q Is there anything in this provision that limits your
20 powers vis-a-vis him?

21 A Not that I'm aware of, no.

22 Q Mr. Goldfarb pointed out the provision here talking about
23 the company being run as it had been in the past. Do you
24 recall that?

25 A Yes.

1 Q Let's take a look at 1.6(a), just up one paragraph.

2 A Uh-huh.

3 Q It reads: The parties agree that prior to the contingent
4 payment due date, the company and the sub will be operated in
5 a manner consistent with past practice and under the
6 operational control of the shareholders' representative.

7 Do you see that?

8 A Uh-huh, yes.

9 Q I need a "yes" for the record.

10 A Yes.

11 Q Let's take under Mr. Calliari's version of his argument,
12 to your understanding, was there past practice at
13 Portionables for amending contracts?

14 A Yes. And I think I stated earlier that they needed to
15 amend the General Mills contract resulting -- because General
16 Mills wanted a reduction in price. And they attempted that.
17 I'm not certain about the numbers relative to how far they
18 were willing to go down. But they were willing to go down.
19 And it wasn't enough, and they lost that business. Plus the
20 North Sioux City plant was laying empty.

21 They also had a situation, as I mentioned earlier as well,
22 with Con Agra, where they needed to reduce pricing in order
23 to maintain business.

24 Q I think you testified that when you purchased, meaning
25 Sargento purchased Portionables, the exclusivity provision in

1 the Unilever contract went away. Do you recall that
2 testimony?

3 A Yeah, I do. And --

4 Q Can you explain what that means and how that works?

5 A Well, again, up until we purchased the company, Unilever
6 could not procure these type of frozen sauce pellets from
7 anybody else. I believe it was North America -- in North
8 America. It may have been the United States. They were able
9 to get them from their facility in Italy, where they had the
10 capability of producing these at any time.

11 So when we bought it, we lost that exclusivity, which
12 obviously exposed us to the potential they could buy from
13 someone else. And there was at least one other company that
14 had, not identical, but somewhat similar technology that
15 could possibly take that business away from us.

16 Q And --

17 A So --

18 Q Let me just get the question out.

19 A I'm sorry.

20 Q How did the, we'll call it the proposed amendment to the
21 contract affect the issue of exclusivity?

22 A Well, the proposed amendment to the contract recovered
23 exclusivity for our benefit. And, again, other than
24 self-manufacturing, they would not be able to buy product
25 from other suppliers such as the company I was mentioning

1 before that had a similar capability.

2 So it again protected us, number one. But, actually, in
3 addition, it protected us a lot more because suddenly they
4 had to buy 20 million pounds from us a year. Even the old
5 contract that Patrick signed in 2004 did not give him minimum
6 volumes to count on. The only thing it gave him was, I
7 believe, Unilever would have to pay him up to a half million
8 dollars a year if they didn't reach those levels, as I
9 understand it.

10 So that was a nice improvement to the contract. But we
11 definitely were able to reinsert exclusivity, which was
12 certainly part of the old contract and necessarily needed to
13 be part of our arrangement with them going forward.

14 Q So that would have been, in your mind, consistent with
15 past practices?

16 A Absolutely.

17 Q Take a look at your discussion with Mr. Goldfarb about the
18 noncompete. I'd like to take you to the provision in the
19 stock purchase agreement on that, which is again Trial
20 Exhibit 3, page 28.

21 A Yes.

22 Q And if you could pull up that first paragraph -- the 5.14.
23 I'm sorry. Thank you. What does this provision provide?

24 A Well, basically, it's providing the shareholders 200 --
25 we're giving the shareholders as part of this purchase

1 agreement \$200,000, which is being allocated to the covenant
2 not to compete.

3 So, therefore, we would be in a protected position that no
4 shareholder, be it Patrick or anyone else, but it included
5 Patrick as well, that no shareholder could compete with us
6 for a period of seven years from the date of this contract, I
7 believe.

8 Q So you paid each shareholder, including Mr. Calliari,
9 \$200,000 for a seven-year noncompete?

10 MR. GOLDFARB: Objection. Leading.

11 BY MR. SULKIN:

12 Q What did you pay \$200,000 to Mr. Calliari and the other
13 shareholders for?

14 A It was an inducement to enter into an agreement in
15 consideration for the noncompete, \$200,000. I don't know if
16 we paid it to each of the shareholders, or it was just -- it
17 may have been paid in total for all of the shareholders.

18 Q And how long was the noncompete?

19 A A seven-year period. That's noted in paragraph A, I
20 believe, during the seven-year period following the closing
21 date.

22 Q I want to switch now to the Unilever discussions in the
23 spring and summer of 2007. I would like to take a look at
24 Exhibit 2 00.

25 A Okay. I've got it.

1 Q Do you have it?

2 A Yes.

3 Q All right. Is this --

4 MR. GOLDFARB: Excuse me, your Honor. This wasn't on
5 the list. I need to grab mine.

6 MR. SULKIN: I'm happy to give him a minute or jump
7 to another subject while he's doing that, your Honor.

8 THE COURT: Would you like us to move to another
9 topic, Mr. Goldfarb?

10 MR. GOLDFARB: No. I've got it.

11 THE COURT: Go ahead.

12 BY MR. SULKIN:

13 Q Without getting into the contents of this, what is this
14 document?

15 A It's an e-mail from Mike Gordy to Pat Calliari, copying
16 George Hoff, myself, and Tom Kyle, who was at that time the
17 production manager at the Bellingham facility. He may have
18 also had some production responsibility at North Sioux City,
19 oversight. And then Larry Riley, their accountant or
20 controller.

21 Q And was this a document that was created in the ordinary
22 course of Sargento's business?

23 A I don't understand that question.

24 Q Sure. Was it done in relation to Sargento's business?

25 A I think this related more to Portionables' business.

1 Q And Portionables was a part of Sargento?

2 A Yes.

3 MR. SULKIN: Your Honor, I offer Exhibit 200.

4 MR. GOLDFARB: Object to this exhibit, your Honor.
5 It contains hearsay statements. These are not admissions of
6 a party. These are statements of a party. And it has
7 embedded in it additional hearsay from conversations with
8 third parties.

9 THE COURT: Can you move to another area, and then
10 we'll take this up?

11 MR. SULKIN: Yes, your Honor.

12 THE COURT: Okay.

13 BY MR. SULKIN:

14 Q Mr. Gentine, when did you first learn that Unilever wanted
15 a price reduction?

16 A I would have learned that they wanted a price reduction
17 when I received a copy of this e-mail.

18 Q Let me jump forward a little bit. There's been testimony
19 about the 35 cent offer that Mr. Calliari made to
20 Portionables. Do you recall that?

21 A Yes.

22 Q And I think the testimony was -- we'll see from
23 Mr. Calliari -- it was made on or about June 8th, okay?

24 A Yes.

25 Q When did you learn about that offer made by Mr. Calliari?

1 A I believe that I learned about that offer later in July.
2 There was an e-mail that was sent that Patrick had made an
3 offer reducing it by four cents a pound.

4 Q So to be clear, did you have any -- did you order
5 Mr. Calliari to make an offer of 35 cents a pound?

6 A Absolutely not. I believe that that offer was something
7 that Mr. Calliari, Mike Gordy, other members of the
8 Portionables' team got together and discussed the issue and
9 decided that, hey, we can knock 4 cents off, and we'll be
10 comfortable with that. And they made that offer.

11 Q And I'd like you to take a look at Exhibit 201.
12 Mr. Gentine, you've seen this document before?

13 A Yeah, yes.

14 Q And this is an e-mail from Mr. Calliari dated July 26 to
15 you?

16 A Uh-huh.

17 Q Was this made as part of Portionables' business with
18 Sargento?

19 A Uh-huh.

20 Q I need a "yes" for the record.

21 A Yes, uh-huh.

22 MR. SULKIN: Your Honor, I offer Exhibit 201.

23 MR. GOLDFARB: Your Honor, I have fundamentally the
24 same problems with this document. I think it makes sense to
25 address them both at the same time.

1 THE COURT: And can you push any further?

2 MR. SULKIN: My concern is it's going to keep coming
3 up. But I'll try, your Honor.

4 Q I want you just to tell the story, okay, how we got from
5 34 cents a pound or the 35 cents a pound offer to Unilever to
6 the offer made on August 16th. I think it was 37 and a half
7 cents on the first 20 million pounds and then 23 cents a
8 pound after that. So if you could just kind of take us
9 through how that decision was made and who was involved, I
10 would appreciate it.

11 MR. GOLDFARB: Excuse me, your Honor. Objection to
12 lack of foundation to the degree to which this witness was
13 involved in that very broad question that was asked. There
14 are a number of people involved apparently in these
15 discussions. And what he knows or doesn't know, I can't tell
16 from this question that says: Explain how this whole thing
17 happened.

18 THE COURT: Why don't we talk about his involvement.
19 So limit it to his personal knowledge.

20 MR. SULKIN: That's fine, your Honor.

21 Q Could you limit your answer to your personal knowledge as
22 to how we get from 34-35 cents a pound to the offer that was
23 made on August 16?

24 A Well, at that point I did get involved, because obviously
25 there was a great concern that the pricing on Unilever was

1 going to drop dramatically, impacting long-term performance
2 of the company, obviously impacting the performance during
3 the earnout period. So I was involved. And Patrick and I
4 and others sat down and discussed it. And, quite honestly --

5 Q May I interrupt for one second, just to set the scenery?

6 A Yes.

7 Q Patrick made an offer of 34-35 cents a pound. Did you
8 learn of a counteroffer by Unilever to that?

9 A Yes.

10 Q What was that counteroffer?

11 A That they felt they needed another five or six pounds
12 (sic) less than the 35 cents.

13 Q 5 or 6 cents less per pound?

14 A Yes.

15 Q So less than Mr. Calliari's 35 cents. Now, at least I can
16 understand your involvement in the discussion. So excuse me.
17 Please go ahead.

18 A Okay. So in any case, I looked at more of the broad
19 strategic need to maintain Unilever as a client. Again, as
20 has been stated earlier, they were our primary, almost our
21 only client, in Bellingham. And we didn't have hardly
22 anybody as a client in North Sioux City.

23 Needless to say, we paid 19 million dollars for this
24 company, minimally 19 million dollars, and beginning to look
25 at the potential that we would have no clients. That would

1 be a very bad acquisition at that point.

2 So we needed to come up with something that worked for all
3 parties. So what we decided to do -- and Patrick and I and
4 George Hoff, I believe Mike Gordy were involved in this. I
5 suspect we got numbers cranked by Larry Riley, who is a
6 controller out at Portionables, as well as maybe some of our
7 financial people as well, looked at, well, how could we come
8 up with something better?

9 So, basically, again, I told you I was with
10 Pricewaterhouse. I'm sort of an accountant by, you know,
11 education, et cetera. I was a CPA, et cetera. I came up
12 with the concept that, hey, why don't we try to do something
13 that's better for us and potentially better for Unilever as
14 well.

15 And that's where we came up with, number one, let's get a
16 minimum in there that guarantees us a floor level of
17 production over a longer period of time. So we set that
18 minimum at 20 million dollars.

19 Q 20 million dollars?

20 A 20 million pounds. I'm sorry. 20 million pounds. And we
21 said that 20 million pounds is going to be at the 38 and a
22 half cent price that we currently have. However, because if
23 we do 20 million pounds, the calculations that were provided
24 suggested that all of the burden and the overhead for the
25 plant in Bellingham was really covered by that and we

1 wouldn't need to continually charge Unilever for those type
2 of costs over and above the 20 million pounds.

3 So we said, over 20 million pounds, we'll give you just a
4 dandy price, that is, 23 cents a pound. And, in fact, as a
5 real encouragement for them to buy a lot more than 20 million
6 pounds from us and not go to self-manufacturing or not go to
7 other customers, because at this point they no longer had --
8 we no longer had an exclusive with them.

9 And, you know, they were talking about volumes of anywhere
10 between 30 and 40 million pounds that they might be able to
11 produce if we gave them savings. Well, if we used 40 million
12 pounds -- and they needed to make changes to the plant to get
13 up to those levels of production -- under my deal, we were
14 first of all guaranteed, or my suggested deal that we all
15 agreed on, we were guaranteed the 20 million at 38 and a
16 half. If we did another 20 million at 23, the average of 38
17 and a half and 23 is somewhere between 30 and 31 cents a
18 pound.

19 So Steve Boland from Unilever could feel good about
20 getting down to that 31 cents a pound, but we wouldn't be
21 giving it to them on pound number one, because what we could
22 have ended up with is just them continuing at the volumes
23 they were at before, and it would have been a reduction in
24 price of 8 or 9 cents a pound right off the top, or they
25 could just buy 5 million pounds. And we would have been in

1 deep trouble. And the shareholders, the former shareholders,
2 would have been in severely deep trouble.

3 So in any case, looking at the numbers the way they were,
4 we got -- versus what Patrick had initially proposed to them,
5 which was the 35 cents a pound, we received, on the first 20
6 million, an extra 3 and a half cents a pound, 35 versus 38
7 and a half, on the first 20 million pounds. Plus it was
8 guaranteed. Plus we had exclusivity back. Wonderful.

9 So 3 and a half cents a pound, the delta being what I
10 described before, times 20 million, was an additional
11 \$700,000 that we would benefit on those first 20 million
12 pounds. Granted, over that price, going forward, there would
13 be 23 versus his proposal of 35 cents a pound. So we would
14 have 12 cents a pound that we would be making less than they
15 would have had they gotten up to those levels.

16 So if you take 700,000 and divide it by 12 cents a pound,
17 it would mean that the break-even point, where it would be
18 revenue and income neutral for Portionables as well as for
19 Portionables' shareholders, it would have been a number that
20 was approximately 26 million pounds. You take the 700,000 we
21 saved, divided it by the 12 cents a pound difference, it's
22 between 25 and 26 million pounds. It was a good deal for
23 everyone. Plus we had a lock-in.

24 Q So if I understand, if they ordered 40 million pounds, it
25 comes to Boland's number, 31 cents a pound?

1 A Right.

2 Q In fact, if Unilever ordered 26 million pounds, it comes
3 out to Mr. Calliari's number, about 35 cents a pound average?

4 A Exactly. That would be the break-even point. After that,
5 it would have been lower. But obviously it would have been
6 great tonnage for us. We would have been thrilled.

7 And looking again at that 25 to 26 million pounds, the
8 year before, they did 19. And, quite honestly, in the
9 projections that Patrick had provided us going forward in
10 those hockey stick projections for 2007 and 2008, Unilever
11 was never projected to do more than 20 million. They weren't
12 going to be adding a meaningful incremental amount to hit
13 that 74 million in 2008 or the 46 or 47, whatever the number
14 was in 2007.

15 The fact is, they also would have never bought -- and as
16 they mentioned --

17 Q I'm going to get to that in a minute. I'm going to stop
18 you there. Was this meeting, you said, between you,
19 Mr. Hoff, Mr. Calliari, perhaps Mr. Riley and Mr. Gordy, was
20 that an in-person meeting or was this over a phone call?

21 A I believe we had the meeting in our conference room at
22 Sargento.

23 Q So Mr. Calliari, to your recollection, flew in for that
24 meeting?

25 A Yeah.

1 Q Okay. Now, you were answering Mr. Goldfarb relating to,
2 well, gee, didn't you lose 1.3 million dollars on this. And
3 I think your answer was: Well, in a vacuum, yes. But I
4 think the word was fuzzy math. I may be wrong. More fully
5 explain your answer to the question Mr. Goldfarb asked, which
6 I think was: Look. You gave up 1.3 million dollars by
7 reducing the price from the original price of 39 cents to 23
8 cents.

9 A Yeah, I think it was 37 cents down to 23 cents. It was 14
10 cents a pound. And if you just looked at it like that,
11 that's fine. However, we were going to make -- based on what
12 Patrick said, we were going to make 3 and a half cents less
13 for the first 20 million, and then for the next volume above
14 that, as I said, the 12 cents a pound I just described.

15 So that is part of it. You can't look at it that way
16 because he had already made a proposal to them at a lower
17 amount, being the 35 cents. He couldn't really compare it to
18 the 37. And then, in addition, the fact of the matter is
19 that Unilever was telling us they're going to go into
20 self-manufacturing.

21 And, therefore, if we didn't get that price down to a
22 lower number, there was no way that they were going to be
23 buying more than the 18, 19, 20 million pounds they had done
24 in the past, because it would have not been efficient for
25 them.

1 MR. GOLDFARB: Excuse me, your Honor. Move to strike
2 the nonresponsive portions of that answer, particularly the
3 hearsay that had to do with what Unilever might or might not
4 have done.

5 MR. SULKIN: Your Honor, if I may respond.

6 THE COURT: Go ahead.

7 MR. SULKIN: Mr. Goldfarb asked a hypothetical
8 question about the 1.3 million. And all I asked was: I want
9 you to more fully explain your answer. And so it's in that
10 vein the question was asked. And I think the answer should
11 stay.

12 THE COURT: The motion to strike will be granted.
13 The jury should disregard the comments concerning what
14 Unilever was going to do or not do.

15 BY MR. SULKIN:

16 Q Did Mr. Calliari say he was against that proposal?

17 A No. And, in fact, he signed the proposal, which he
18 wouldn't have had to do. He could have come back and said,
19 hey, I'm against this proposal.

20 MR. SULKIN: Your Honor, this is probably a good time
21 to take up those other issues.

22 THE COURT: Okay. Ladies and gentlemen, we're going
23 to send you home a little early today. And I wish I could
24 say you're going to enjoy the sunshine, but there's not much
25 left out there.

1 When you go home tonight, there's still going to be
2 interest in what you are doing at the courthouse. In fact,
3 you may have some more questions today. And you still have
4 to persevere. Tell them next week you will be happy to tell
5 them anything they want to know about cheese or Portionables
6 or how contracts are negotiated. And tell them that you are
7 not going to talk about it, okay? I've explained why before.

8 And I hope that you can see that everything needs to come
9 to you here all at the same time so we all hear the same
10 thing. So please remember those admonitions that I've given
11 you. And remember that your obligation is not only to be
12 fair, but to give the appearance of fairness.

13 Tomorrow I would like to tell you a little bit about this
14 courthouse when you come in. When you walk out tonight, I'd
15 like you to take a look at the artwork that's down in the
16 lobby and also what's out on the lawn. There is a big
17 sculpture out on the lawn. And I'm going to ask to see if
18 any of you know what it is. So that's the only homework you
19 get to do.

20 All right. Any questions? We're going to start at the
21 same time tomorrow. Have a good evening.

22 (Jury leaves courtroom.)

23 THE COURT: All right. Let's talk about these two
24 exhibits.

25 You can step down, sir.

1 MR. SULKIN: And there's actually a third we might as
2 well take up.

3 THE COURT: Well, let's take it all up at once. And
4 what's the third one? We've got 200. We've got 211, and --

5 MR. SULKIN: I have 200, your Honor, 201. And we're
6 going to get to the August 16th, which I think is in.

7 THE COURT: Oh, 202, yes. I'm looking at the case
8 number, which is interesting. It's 1111.

9 MR. SULKIN: So 200, 201, and 203.

10 THE COURT: Okay. Can I have 203, please, as well?
11 All right. This is your objection, Mr. Goldfarb. Why don't
12 you explain to me what the issues are.

13 MR. GOLDFARB: I'm not sure that the documents are
14 all in exactly the same frame, your Honor. But as I look at
15 201, it seems to me that it reflects right at the top --

16 THE COURT: Mr. Goldfarb, could I have you go over to
17 the microphone? I'm having a very hard time hearing you.
18 And I don't exactly know why. The microphone on your table
19 might be out or something. No? Okay.

20 MR. GOLDFARB: So, your Honor, 200 just appears to be
21 full of conversations between, I think, Mr. Gordy and this
22 Mike Pusterla at Unilever. I point out to the court that
23 they took Mr. Boland's deposition, which is what it is. But
24 they shouldn't attempt to get this type of information in
25 about what Unilever was or was not saying through the

1 document.

2 THE COURT: Well, let's figure out who the declarant
3 is. This is from your client.

4 MR. GOLDFARB: I'm looking at 200, your Honor.

5 THE COURT: Oh, I'm sorry. I'm looking at 201.
6 Excuse me. Okay.

7 MR. GOLDFARB: So the declarant in 200 appears to be
8 Mr. Gordy, who is a Sargento employee. And he appears to be
9 repeating the conversation that he had with Mr. Pusterla. So
10 that would seem straightforward as hearsay.

11 THE COURT: Why does this matter? Let me understand
12 the context of this. Why does this matter to you? In other
13 words, is there a contest over whether or not these
14 negotiations took place, or --

15 MR. GOLDFARB: You know, your Honor, I'm glad you
16 asked that question. It only matters to me because it
17 matters to them, to be very candid. I have never thought
18 that this was really the issue of this case.

19 You know, conversations were what they were. But they
20 ended up in a contract. You know, this process went on. But
21 at the end of the day, Mr. Calliari asserted certain rights.
22 He either had a contractual right to do that or he didn't.
23 And, you know, that turns on what the agreement is saying.

24 That said, they are going to enormous efforts here to say
25 that Mr. Calliari backtracked and he did this and he didn't

1 do that. If that story is going to be told in detail, then,
2 you know, we're put in a position we need to litigate it.
3 And the way it's being presented is really not completely
4 accurate in terms of what happened. That's why.

5 THE COURT: So you are saying that they ought to be
6 putting Mr. Pusterla on to say what the offer was that he was
7 making or what it is that he was going after?

8 MR. GOLDFARB: Well, you know, there appears to be
9 these negotiations going back and forth between the Sargento
10 people and the Unilever people. And those conversations in
11 these documents are hearsay to the extent that they're coming
12 from the Unilever folks.

13 THE COURT: Does it matter whether or not what they
14 are saying is true or accurate?

15 MR. GOLDFARB: Well, it does if you listen to the
16 witness' testimony about what a great deal it was because of
17 the pricing and so forth, so it kind of does matter.

18 THE COURT: Okay. And does it make a difference
19 whether it's a good deal or not? I mean, I'm trying to get
20 at the crux of whether or not it makes a difference whether
21 the deal that was struck is good, bad, or indifferent.
22 Aren't we here to talk about who had the right to make it
23 under the contract?

24 MR. GOLDFARB: I fully subscribe to that view, your
25 Honor. But what's being currently argued to the jury is

1 something quite different than that. And to the extent
2 evidence is coming in to further arguments that I don't
3 understand what's going to ultimately happen to them, I'm
4 trying to protect my client's interests as best I can.

5 THE COURT: All right. So you think the first --

6 MR. GOLDFARB: I think 200 is hearsay, yes, your
7 Honor.

8 THE COURT: You think 200 is hearsay from beginning
9 to end?

10 MR. GOLDFARB: Yes.

11 THE COURT: And it's hearsay because it's one of --
12 Mike Gordy is one of Sargento's employees, so anything that
13 he says cannot be put in by the defendant?

14 MR. GOLDFARB: That's true enough. And further to
15 that, it also repeats conversations by Mr. Pusterla. So
16 there's at least two levels there.

17 THE COURT: Okay. All right. Mr. Sulkin, your
18 response, please.

19 MR. SULKIN: Okay. Your Honor, this is offered. It
20 is notice to Mr. Calliari. Really, all I'm interested in, we
21 can just focus really on one sentence. It's after that
22 darkened thing there. Go down to those two lines under
23 there. There's a sentence. This is Mr. Calliari: I told
24 Mike that I would have to defer to you and your team on the
25 request, that is, the request concerning Unilever.

1 THE COURT: All right. Orient me, please.

2 MR. SULKIN: Sure. It's kind of the third paragraph,
3 if you count that darkened line in the paragraph, the
4 darkened sentence. It's the third one, last line, where it
5 begins: I told Mike.

6 THE COURT: Yes.

7 MR. SULKIN: It reads: I told Mike I would have to
8 defer to you and your team on the request. Well, one issue
9 in this case is were we taking his control. What we want to
10 use this for, quite candidly, is to say that Mr. Calliari
11 never claimed that, because it really goes to notice to him,
12 that this isn't true, you aren't deferring to me.

13 And so it goes to that, just to that issue. It's not
14 being offered for the truth of the matter asserted at all.
15 It's being offered as evidence of notice and the fact that
16 Mr. Calliari didn't respond, didn't say, that isn't true,
17 that in fact you are taking my control on this subject.

18 THE COURT: How do you get around the fact that it's
19 hearsay?

20 MR. SULKIN: Because it's not being offered for the
21 truth of the matter asserted, your Honor. It's being offered
22 as notice to Mr. Calliari. It may be untrue that they
23 deferred to the team. That's not the point. The point is,
24 he's being told that. And so what we want to get to is what
25 his reaction is. So whether it's true or not is not

1 relevant. So it isn't hearsay.

2 THE COURT: Mr. Goldfarb, do you accept that, if it's
3 offered to the jury for the limited purpose of notice that
4 Mr. Calliari was notified that they wanted feedback from him?

5 MR. GOLDFARB: Yes, your Honor.

6 THE COURT: Okay. Can you live with that,
7 Mr. Sulkin?

8 MR. SULKIN: Yes, your Honor.

9 THE COURT: All right. We have a deal. Next.
10 What's the next issue?

11 MR. SULKIN: 201.

12 THE COURT: 201. All right. This one is from your
13 client.

14 MR. GOLDFARB: Right.

15 THE COURT: So is it an admission of a party opponent
16 if your client says it?

17 MR. GOLDFARB: When he's simply repeating factual
18 information provided to him by somebody else that may or may
19 not be true and it is not independently verifiable.

20 THE COURT: Well, if it's not offered for the truth,
21 but only the fact that he said it --

22 MR. GOLDFARB: Okay. And, again, I think to move
23 this along, I can live with that conclusion as well.

24 THE COURT: All right. That one will come in with
25 the same limitation. It's not offered for the truth, but

1 only to show that Mr. Calliari made the statement.

2 MR. SULKIN: 203. If I can give a little background
3 on 203, your Honor.

4 THE COURT: Okay.

5 MR. SULKIN: I think you also need to look at 270. I
6 don't know if you have that in front of you or not.

7 THE COURT: Well, let's get it. 270. Okay.

8 MR. SULKIN: Look at 270 first. This is the August
9 16th draft letter. And I don't know if Mr. Goldfarb has a
10 problem with it.

11 THE COURT: So the first is simply a transmittal
12 letter saying attached is a letter that's going to go out.

13 MR. SULKIN: Correct.

14 THE COURT: Is there a problem there, Mr. Goldfarb?

15 MR. SULKIN: I don't think he objected to 270.
16 Mr. Calliari says: I sent it back. I sent it to Boland, is
17 what he writes back at the top of that. There's no objection
18 to 270.

19 THE COURT: Well, hold on. I haven't heard that out
20 of Mr. Goldfarb's mouth yet. Is there an objection to 270?

21 MR. GOLDFARB: No.

22 THE COURT: Okay.

23 MR. SULKIN: Now, 203, your Honor, is already in to
24 the extent, as you recall in my opening, in his deposition
25 Mr. Calliari already testified that he saw this document and

1 he signed it. So he hasn't objected to it. And I presume
2 it's in. But I didn't want to waste time tomorrow.

3 THE COURT: Okay. This is the one that nobody can
4 find the signed copy.

5 MR. GOLDFARB: This is the one where they went out to
6 Unilever and apparently didn't ask them for it. They don't
7 seem to have a copy of it. We don't have one. So what we
8 have before the court is this unsigned draft, which may or
9 may not be what was actually sent. I don't have any idea.
10 I've never seen the signed original of this letter. So I
11 just don't know.

12 MR. SULKIN: This is the one, your Honor, that -- we
13 can do it one of two ways. Mr. Calliari -- we can just play
14 his tape -- testified that he signed this draft. I mean,
15 Mr. Goldfarb was right. I asked him: Did you sign this
16 draft, this exhibit number? He said: Yes. So that's how we
17 got around the problem of not having the original.

18 So I can have Mr. Calliari -- do it with him tomorrow, and
19 then call Mr. -- so it's into evidence, and then call
20 Mr. Gentine back and say: Is this the document you sent to
21 him? Or I can just do it tomorrow with Mr. Gentine. And I
22 prefer to do it just in order with Mr. Gentine.

23 THE COURT: Is there an objection to this one?

24 MR. GOLDFARB: It's just not signed, your Honor.
25 That's all. It's not the letter that was sent. It's a

1 draft. That's all.

2 THE COURT: Well, what's the rule when you've got
3 something that's unsigned?

4 MR. SULKIN: We're going to offer it, your Honor.
5 And we will explain to the jury this isn't the original, that
6 this is the draft, the original was signed, so this is the
7 original document in that regard. And they can argue if they
8 want that it wasn't signed. But Mr. Calliari testified it
9 was.

10 THE COURT: Well, Mr. Goldfarb, give me the rule that
11 you are relying upon that I should exclude it.

12 MR. GOLDFARB: Your Honor, if it comes in with the
13 instruction that the original has not been located, I think
14 that, to move this along, we can live with that. And it's up
15 to them to establish what was and was not sent. The record
16 will be what it is.

17 MR. SULKIN: He can argue that. That's fine, your
18 Honor. We're not claiming this is the original. We will not
19 claim that.

20 MR. GOLDFARB: I don't know if this is the right
21 letter or not. My instinct says it's just some unsigned
22 draft. I would like to see the actual letter that went out.
23 This seems to be a big issue in the case. I don't understand
24 why it's not here.

25 But that said, this draft made its way to Mr. Calliari.

1 So for that purpose, you know, I think that much is true.
2 And then they're going to prove or not prove that it was sent
3 or some version of this was sent.

4 THE COURT: Well, what difference does it make? Is
5 Mr. Calliari going to say: I didn't make Unilever an offer
6 in August? He's going to say: I made Unilever an offer.

7 MR. GOLDFARB: I presume so.

8 THE COURT: Then --

9 MR. GOLDFARB: Very well. I withdraw any objection
10 to this exhibit. I'm now worried about our Monday deadline
11 again. I just want to keep this moving. And I understand
12 your Honor's point.

13 THE COURT: Mr. Goldfarb, don't let me beat you down.
14 I haven't said a thing.

15 MR. GOLDFARB: No, your Honor, I just --

16 THE COURT: My husband tells me I've got a look that
17 can stop a truck. But that doesn't necessarily mean I'm
18 trying to stop your objection. If you want to make an
19 objection, make it. I'll rule on it.

20 MR. GOLDFARB: No. I've made enough today. That's
21 fine.

22 THE COURT: And if you tell my husband I said that,
23 I'll deny it.

24 MR. SULKIN: Believe me, I will never say that.

25 THE COURT: All right. Are we ahead or behind where

1 we need to be?

2 MR. SULKIN: My guess is we're going to finish this
3 week, your Honor.

4 MR. GOLDFARB: We're still ahead, but not as ahead as
5 we were yesterday.

6 THE COURT: Okay. Who's coming tomorrow?

7 MR. SULKIN: From what I understand, we'll finish
8 Mr. Gentine. Mr. Calliari is going to be called. And our
9 present intention is to call two witnesses, Mr. Hoff,
10 Mr. McEvoy. It should be reasonably short. I think under an
11 hour each. And depending on what Mr. Calliari says, it's
12 possible that Mr. Gentine may come to rebut, literally, just
13 to rebut a few points he makes, if necessary. And that would
14 be it for us.

15 MR. FISHER: And, your Honor, we do have that short
16 deposition reading before we rest. And I'm sorry,
17 Mr. Sulkin. Did you say you were calling Mr. McEvoy?

18 MR. SULKIN: We are going to call Mr. McEvoy and
19 Mr. Hoff. We're not waiving our right to call Mr. Thomas and
20 the Birds Eye guy. But from my discussion with Mr. Goldfarb,
21 he wasn't going to go too deeply into those issues. And if
22 he doesn't, our present intent is to not call them.

23 THE COURT: All right. Well, look, for tomorrow,
24 we're going to finish up with Mr. Gentine. We're going to
25 call Mr. Calliari. And if we keep working at this pace,

1 we're -- well, I'm not as hopeful about how far ahead we'll
2 stay. But I'm assuming that most of the documents that we're
3 going to be working with are already in.

4 MR. SULKIN: That's right, your Honor.

5 THE COURT: Okay.

6 MR. GOLDFARB: And, your Honor, the deposition of
7 Michael Gordy was taken and was going to be presented by
8 Sargento. I'm hearing now that they may not do that. There
9 are some very small pieces of that deposition that we're
10 probably going to want to put in. But it's a matter of a few
11 minutes.

12 THE COURT: Okay. All right. Can I go?

13 MR. SULKIN: Yes.

14 THE COURT: All right. Have a nice evening. We'll
15 see you tomorrow.

16 (Proceedings adjourned.)
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C E R T I F I C A T E

I, Kari McGrath, CCR, CRR, RMR, Official Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

/S/ KARI McGRATH

Kari McGrath, CCR, CRR, RMR

Official Court Reporter